(8) No. 02-271

DEC 18 2002

CLERK

In the Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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8.	Excerpts of Plaintiffs' Second Supplemental Memorandum on Class Definition and Supplemental Memorandum on Generic Causation, filed Sept. 12, 1983 in *In re Agent Orange Product Liability Litigation*, MDL No. 381 [pp. 1-3, 5-6, 56]	70

9. Transcript excerpt of Dec. 12, 1983 hearing before Chief Judge Weinstein in *In re Agent Orange Product Liability Litigation*, MDL No. 381 [pp. 20-21, 56-58, 61-62, 65-67, 71-73, 75, 111-12] 76

10. Stipulation of Settlement dated May 7, 1984 in *In re Agent Orange Product Liability Litigation*, MDL No. 381 88

11. Settlement Agreement signed by class and defense counsel, filed June 11, 1984 in *In re Agent Orange Product Liability Litigation*, MDL No. 381 90

12. Notice of Proposed Settlement of Class Action and Claim Form, dated June 11, 1984 in *In re Agent Orange Product Liability Litigation*, MDL No. 381 105

13. Objections of William P. Stimson to Proposed Settlement of Class Action dated July 26, 1984, in *In re Agent Orange Product Liability Litigation*, MDL No. 381 and *Ryan v. Dow Chemical Co.*, No. 79 C 747. 122

14. Transcript excerpt of Aug. 10, 1984 hearing before Chief Judge Weinstein in *In re Agent Orange Product Liability Litigation*, MDL No. 381 [pp. 702-03, 724-25, 729-34, 736-40, 769] 126

15. Memorandum in Support of Plaintiffs' Motion Pursuant to Rules 52(b) and 59(e) to Reconsider the Order of January 7, 1985 Which Approved the Settlement, filed Mar. 7, 1985 in *In re Agent Orange Product Liability Litigation*, MDL No. 381 [pp. 93-97, 117-18, 155-73, 174-201] 137

16. Transcript excerpt of Mar. 18, 1985 hearing before Chief Judge Weinstein in *In re Agent Orange Product Liability Litigation*, MDL No. 381 [pp. 1, 5-8, 48-56, 70, 75, 81-82] 183

17. Excerpt of Appellants' Reply Brief dated Mar. 25, 1986 in *In re Agent Orange Product Liability Litigation*, No 84-6273 et al. in the United States Court of Appeals for the Second Circuit [pp. 15-17] 195

18. Civil Action Complaint filed July 17, 1998 in *Isaacson v. Dow Chemical Co.*, No. OCN-L-2415-98 in the Superior Court of New Jersey 199

19. Amended Complaint filed September 18, 1998 in *Isaacson v. Dow Chemical Co.*, No. 3-98cv03988, in the United States District Court for the District of New Jersey 217

20. Exhibits to Sept. 21, 1998 Plaintiffs' Motion for Remand filed in *Isaacson v. Dow Chemical Co.*, Civ. No. 3-98-03988 (AET), in the United States District Court for the District of New Jersey 234

21. Affidavit of Daniel Raymond Stephenson dated May 21, 1999, filed in *In re Agent Orange Product Liability Litigation*, MDL No. 381 243

22. Defendants' Notice of Motion for Dismissal with Prejudice dated Oct. 12, 1999 in *Ryan v. Dow Chemical Co.*, No. 79 C 747; *In re Agent Orange Product Liability Litigation*, MDL No. 381; *Isaacson v. Dow Chemical Co.*, Civ. No. 98-6383; and *Stephenson v. Dow Chemical Co.*, Civ. No. 99-3056 245

23. Affidavit of Steven Brock in Support of Defendants' Motion to Dismiss with excerpts of attachments 248

24. Excerpts of attachments to Opposition of Plaintiff Joe Isaacson to Defendants' Motion to Dismiss 290

25. Notice of Appeal filed Mar. 10, 2000 in *Isaacson v. Dow Chemical Co.* with attached Order of Dismissal 326

26. Notice of Appeal and Amended Notice of Appeal in *Stephenson v. Dow Chemical Co.*, filed Apr. 7, 2000 and May 8, 2000 331

27. Letter from Steven Brock to Ms. June Lowe dated Apr. 6, 2000 and enclosing for Judge Weinstein's signature an Order and Judgment with attached transcript of proceedings in *In re Agent Orange Product Liability Litigation*, MDL No. 381; *Isaacson v. Dow Chemical Co.*, Civ. No. 98-6383; and *Stephenson v. Dow Chemical Co.*, Civ. No. 99-3056 337

Excerpts of Docket Sheet for MDL No. 381
In re AGENT ORANGE PRODUCT LIABILITY LITIGATION

* * * *

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Date	NR	PROCEEDINGS
8-15-79		Stipulation of dismissal of deft Northwest Industries Inc and its subsidiaries with prejudice in all actions except Kahler -v- Dow Chemical et al, (79 C 922) filed by counsel for pltff and counsel for deft Northwest Industries Inc., (unsigned by the Court). km (51)
8-15-79		Stipulation of dismissal of deft Northwest Industries Inc. and its subsidiaries w/o prejudice to the remaining defts and to whatever rights they may have against Northwest Industries Inc. filed by counsel for defts Diamond Shamrock Corp., Monsanto Co:, Hercules, Inc. and North American Philips (not signed by the court). km (52)
8-17-79		Second amended verified complaint filed. km (53)
8-17-79		Letter dtd 7-19-79 to J.Pratt from Sidley & Austin in re: dismissal of actions against Northwest Industries filed. km (54)
8-20-79		Letter dtd 8-16-79 to J. Pratt from Leonard L. Rivkin in re: service of documents by pltff on defts filed. km (55)
8-23-79		Notice of appearance of Blackwell, Sanders, Matheny, Weary & Lombardi as co-counsel w/ Clark, Gagliardi & Miller for deft North American Philips Co. filed. km (56)

Date	NR	PROCEEDINGS
9-14-79		Notice of motion ret 10-3-79 for an order dismissing the second amended verified complaint for lack of jurisdiction over subject matter filed w/memo in support. km (57, 58)
9-17-79		Notice of motion ret. 10-3-79 for summary judgment in favor of deft North American Philips Corp. filed with memo in support. km (59,60)
9-__-79		Pltff's memo of law opposing defts' motion to dismiss filed km (61)
9-_-79		Pltff's cross-motion v. deft North American Philips Corp. filed km (62)
9-_-79		Pltffs' notice to produce certain documents or deny the existence thereof by deft North American Philips Corp. filed with Pltffs' notice to deft North American Philips Corp. to admit or deny certain facts km (63, 64)
9-26-79		Memo of North American Philips on class certification filed. km (65)
9-26-79		Dow Chemical Co.'s memo of law in opposition to certification of pltffs' action a class action filed km (66)
9-27-79		Defts' memo in response to pltff's motion for class certification filed by Diamond, Shamrock, Hercules Inc. and Monsanto km (67)
10-9-79		Reply memo of law in support of defts' motion under Rules 12(b) and 12(f) with respect to the second amended verified complaint filed. km (68)
10-9-79		Deft North American Philips' further memo on its motion for summary judgment filed with affidavit of Lawrence T. D'Aloise, Jr. km (69,70)

Date	NR	PROCEEDINGS
10-15-79		Letter dtd 10-14-79 to J. Pratt from Victor J. Yannacone, Jr. in re: filing of a third amended verified complaint filed. km (71)
10-15-79		Third amended verified complaint filed. (TAVC) km (72)
10-17-79		Pltffs' reply memo on class certification filed/ km (72)
10-18-79		Affidavit of service of third amended verified complaint filed. km (72)
10-26-79		Stenographer's transcript dtd 10-3-79 filed. km (7_)
10-26-79		Dow Chemical Co.'s reply memo in opposition to certification of pltffs' action as a class action filed. km (7_)
10-29-79		Notice of appearance of deft Thompson-Hayward Chemical Co. to be represented by Clark, Gagliardi & Miller filed with consent to substitution in the place and stead of deft North American Philips Corp. km (77)
10-_-79		Certified copy of conditional transfer order from MDL Panel directing transfer case C.A. No. 79-3460 from ED of Pennsylvania to EDNY for inclusion in MDL #381 filed. (EDNY docket #: 79 C 2752) km (__)
10-26-79		Certified copy of conditional transfer order and cover letter sent to USDC for the ED of Pennsylvania. km

* * * *

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nt down rules for the filing of objections to the special masters ruling;
The Special masters' ruling dtd 8-5-82 is affirmed., filed. c/m gv (973)

26-82 Consent and waiver pursuant to pretrial order No. 38, filed. gv (974)

30-82 Ltr of Thomas A. Beck to Pratt, J., dtd 8-20-82, in re of pretrial order No. 38 to be clarified, filed. gv (976)

30-82 Stenographers transcript of 8-24-82, filed. gv (976)

30-82 By Pratt, J., dtd 8-25-82, Pretrial Order No. 40, that Uniroyal's motion from pretrial order 38 is denied without prejudice to renewal at future dtd if changed circumstances would warrant a changed result, filed. c/m gv (977)

7/82 Stenographer's transcript dated 9/2/82 filed ajh (978)

7/82 Stenographer's transcript dated 9/2/82 filed ajh (979)

9-82 Govt's copy of deposition to be held, of Robert J. Anderson 9-8-82, Warren Shaw 9-9-82, filed. gv (980)

9-82 Response of Riverdale Chem. Co. to pltffs' request for expedited answers regarding its proposed discovery order served 4-29-82, filed. gv (981)

9-82 Riverdale Chem. Co.'s response to pltffs' notice of insurance disclosure, filed. gv (982)

9-82 Reply memorandum of law in further support of the application of CBS Inc. for access to documents, filed. gv. (983)

9-82 Stenographers transcript of 9-7-82, filed.

gv (984)

20/82 Stenographer's transcript dtd 9/16/82, filed. jk (985)

20/82 Pltffs' Notice of Appeal from Order of Special Master Concerning Insurance, filed w/affidavit of Edward F. Hayes III. jk (986)

20/82 Pltffs' Memorandum in support of motion to discover insurance Appeal matters, filed. jk (987)

20/82 Memorandum of Law in support of the Application of CBS Inc. for access to documents and in support of appeal by CBS Inc from the Special Master's ruling, filed. jk (988)

20/82 By Pratt, J. Pretrial Order N. 41, dtd 9/16/82, that pltffs' motion for leave to file an amended complaint is granted, and the amendments to the complaint contained in Docket paper #3 are deemed incorporated in the complaint. (CV 81-0318) No further service of the amendments is required, filed. jk (989)

13/82 * Before Schreiber, Special Master. Case called. Counsel present (pltffs, defts and Gov't). Conf. Held and concluded. Next conf. to be held on 5/19/82 in Uniondale. Pltffs' motion to obtain depositions in Shoecraft denied. Pltffs' motion to direct defts to produce transcripts at EPA hearing granted. Pltffs' Motion to make audiotapes of depositions denied. Jk (---)

19/82 * Before Schreiber, Special Master. Case called. Counsel present. Conf. held and concluded. Next conf. to be half on 6/2/82 in Washington, D.C. Depositions closed until someone proves to court they

be open - Gov't position in 10 days. Defts requests for Gov't producdtion of Edgewood documents - Gov't will response. Jk (--)

2 * Before Schreiber, Special Master. Case called. Counsel present. Conf. held and concluded. Next conf. to be held on 6/4/82 in Uniondale. Pltffs' motion for production of defts' insurance agreement - Decision reserved. Defts' request for Special Master's attendance at 1st Dep. of gov't witness - granted. Pltffs' motion for "Voir Dire" of gov't witnesses denied. Van Sim deposition for June 23. jk (---)

* * * *

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12/21 1621 Memo of Law of Deft. Monsanto Co. regarding atty-client communications during Party Depositions. Filed.

12/21 1622 Memo of the Undersigned Defts. in Opposition to Pltfs. Motion to Include 2, 4 in this case. Filed.

12/21 1623 Letter dtd. 12/08/83 from Stephen J. Schlegel of Schlegel & Trafelet, Ltd., to JBW stating that o/b/o the Pltfs. Mgt. Comm. that an Amended Complaint would be filed with the Court on 12/8/83 for a number of reasons. See letter for date.

12/21 1624 Copy of Affidavit of William J. Love, Jr., Esq., re: List of individual w/ Agent Orange Claims. filed.

12/21 1625 Letter dtd. 12/9/83 to JBW from William J. Love, Jr. requesting whether any further action need be taken, filed.

12/21 By Weinstein-Order directing Counsel to send notice to all those mentioned in above docket entry #1624 and for clerk to notify counsel and above atty. See document No. 1625 for order. Filed.

12/21 1626 Letter dtd. 12/09/83 to JBW from Patricia D. Howard, Clk., of MDL Panel regarding transfer of 2 conditional transfer orders by Jud. Panel, filed.

12/21 1627 Stenographer's transcript dtd. 12/19/83 at 1:00p.m., filed.

12/21 1628 United States Memo in Oppositin to Defts. Motion for Reconsideration of the Order Grantg. The U.S. Motion to Dismiss Defts. 3rd party complaints, filed.

12/22 1629 Stenographer's transcript dtd. 12/12/83, filed.

12/22 1630 Order Granting Certain Plaintiffs' Motion for Class Certification, unsigned & dtd. 12/12/83, filed.

12/22 * Before Schreiber, Sp. Mstr. Conf. called. Counsel present (Pltfs.. Defts. & Gov't. Hearing scheduled for Monday 12/19/83 at 9:30 a.m. discussed. Counsel of sides are to present to Sp. Mstr. copies of all previous interrogatories except for those that are three years old or from several weeks ago. Duplicates are not to be submitted. Hearg. Scheduled for Thursday, 12/22/83 at 3:00 p.m. Discussion took place on Authorizations for all Med. & Hosp. Records of Pltfs. in case. Auth. are to be done by express mail only, no first class mail. Issues and problems for preparing a Pre-trial Schedule and Order discussed. On Monday, December 19, 1983 at 9:30 a.m.

Pre-trial Order to ready.

12/22 1631 Stenographer's transcript dtd. 12/12/83 at 1:00 p.m., filed.

12/22 1632 Stenographer's transcript dtd. 12/14/83 at 10:45 a.m., filed.

12/22/ 1633 Memo of Deft. Thompson Chemical Corp. on the Jurisdiction and Venue Implications of transfer Pursuant to 28 USC 1404, filed.

12/22 1634 Letter dtd. 12/15/83 from David J. Dean to JBW regarding compensation of atty (see ltr. for further derails) filed.

12/22 1635 Pltfs. Memo on the Court's Power to Hear and Try on the Merits, all Pltfs.

12/22 1636 By Weinstein-dtd. 12/21/83. Pretrial Order No. 75 that United States of America produce all medical records, sociological and service records of the individuals indicted in the order, filed.

12/22/ 1637 By Weinstein-dtd. 12/21/83. Pretrial Order No. 76 that all physicians and medical personnel and organizations produce all records, etc. (see order specific items) to the attys. listed in the order regarding individuals indicated in order.

12/22 1638 By Weinstein-dtd. 12/321/83. Pretrial Order No. 76 that all physicians and medical personnel and organizations produce all records, etc. (see order specific items) to the attys. listed in the order, regarding individuals indicated in the order.

* * * *

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05/04 2747 Ltr. dtd. 04/30/84 from Russell L. Cook,

Jr., Esq. To B. Heineman c/o/c NP

05/04 2748 Ltr. dtd. 5/3/84 from Keith Snyder, Esq. To JBW with publications attached that reproduced the ":legal notice" ordered via PTO No. 72, etc.

05/04 2749 Ltr. dtd. 04/30/84 to Bob Heineman, c/o/c from Patricia D. Howard, Clerk of MDL Panel regarding statistical accountg., MDL Litigation traffic. NP

05/07 2750 By Weinstein, Ch. J. - Order dtd. 05/07/84-Stipulation of Settlement in re "Agent Orange" Product Liability Litigation, M.D.L. 381. See Stipulation for rulings and details.

05/07 2751 Copy of Ltr. dtd 05/04/84 from Kenneth R. Feinberg, S/M to Arvin Maskin, Esq. Ordered Sealed by Ch. J. Weinstein on 05/05/84.

05/07 2752 MDL 381, in re: Agent Orange, Sealed Record before Ch. J. Weinstein 04/26/84;

05/07 2753 Pltfs. Further Memo in Support of the Produdtion of Defts. Employees and Representatives on Pltfs. Case, 5/1/84.

05/07 2754 Stenographer's transcripts dtd. 4/26/84 at 10:00 a.m. before JBW

05/07 2755 Stenographer's transcripts dtd. 4/27/84 at 6:35 p.m. before Mag. Scheindlin.

05/07 2756 Stenographer's transcripts dtd. 4/26/84 at 12:45 p.m. before Mag. Scheindlin.

05/07 2757 Stenographer's transcripts dtd. 4/25/84 at 10:00 a.m. before Mag. Scheindlin.

05/07 2758 Ltr. dtd. 04/09/84 from Philip D. Pakula to JEW.

05/07 2759 Copy of ltr. dtd. 04/23/84 from Stephen J. Schlegal, Esq. To Keith D. Snyder.

05/08 2760 Ltr. dtd. 05/02/84 from Samuel M. Black to B. Heineman, c/o/c.

05/08	2761	Copy of ltr. dtd. Undtd. From B. Heineman, c/o/c to Samuel M.Black.
05/08	2762	Ltr. dtd. 04/30/84 from Samuel M. Black to B. Heineman, c/o/c.
05/08	2763	Copy of ltr. undtd. From B. Heineman, c/o/c to Samuel M. Black.
05/08	2764	Ltr. dtd. 04/27/84 from Jack Mordente of the state of Conn. To B. Heineman.
05/08	2765	Copy of ltr. dtd. 05/07/84 from B. Heineman, c/o/c to Jack Mordente.
05/08	2766	Copy of ltr. dtd. 05/07/84 from B. Heineman, c/o/c to Andres E. Mendez.
05/08	2767	Ltr. dtd. 04/27/84 from Andres E. Mendez of Calif. Dept. of Vets. Affairs to B. Heineman, c/o/c.
05/08	2768	Affidavit of Dorothy Thompson of Los Angeles, Calif., dtd. 05/04/84.
05/08	2769	Telephone call certif.. dtd.05/04/84.
05/08	2770	Listg. Of mail which has been returned as undelivered or undeliverable, 5/4/84.
05/08	2771	Certif. of service of mail deposited in post office, 5/4/84.
05/08	2772	Cert. with respect of mail received, 5/4/84.
05/08	2773	Listg. of mail which has been returned as undelivered or undeliverable, 5/7/84.
05/08	2774	Telephone call certification, 5/7/84.
05/08	2775	Certif. with respect to mail received, 5/7/84.
05/08	2776	Certif. of service of mail deposited in post office, 5/7/84.
05/08	2777	Telegram dtd. 5/7/84 to JBW from Robert T. Finley, disable Vet.
05/08	2778	Telegram dtd. 5/7/84 to JBW from John A. and Judith R. Hanson, regarding settlement.
05/08	2779	Affidavit of William T. Jorden, Esq., of Pennsylvania, dtd. 5/3/84.

05/08	2780	Ltr. dtd. 5/1/84 from Michael F. Aiken, aVV Vet to JBW.
05/08	2781	Ltr. dtd. 04/27/84 from Andres E.Mendez of Calif. To B. Heineman, c/o/c with list of names attached regarding class not.
05/09	2782	File received from USDC Central District of California for line case CV 84-1200 Rosalie Kane.
		* * * *
		[Page 148]
1984 05/29	2879	Memo of Deft. Hooker Chemicals & Plastics Corp. in Support of Its Motion for a Judgment Order in Lester v. Hooker Chemicas & Plastics Corp., filed
05/29	2880	U.S.' Motion For a Stay of all Proceedings as to the U.S. Pending Disposition of its Appeal of Pretrial Order 91 in the Court of Appeals. dtd. 05/23/84. See document no. 2876 for JBW's order regardg. this matter. Memo of Law attached to Motion.
05/29	2881	U.S. of America's Memorandum of Law in Opposition to Diamond Shamrock Corp.'s Motion for Reconsideration of Potential Govt. Liability, dtd. 5/28/84. NP
05/29	2882	Response of the Dow Chemical Co. in Opposition to Pltfs. Motion for Removal Pursuant to 28 USC Sec. 1407. (Paul W. Lester v. The Dow Chem. Co., et al-CV 80-1992). NP
05/29	2883	Memo of Law of the Dow Chemical Co. in Opposition to Pltfs. Motion for Removal Pursuant to 28 USC Sec. 1407. NP
05/29	2884	By Weinstein, Ch. J.-OSC returnable on May 29, 1984 at 2:00 p.m. as to why an order should not be entered dismissing with prejudice all claims asserted in these

proceedings with respect to Agent White, se order for specifics. NP

05/29 2885 Motion for Public Hearings Prior to Acting on Approval of the Proposed Settlement in the Above Captioned Matter (Agent Orange MDL 381). NP

05/29 --- Before Weinstein, Ch. J.- Case called on 05/29/84 at 2 p.m. Counsel for all sides present, listed above. Order submitted by Deft. Dow Chem Co. signed with respect to Agent White and the court's disjissal with prejudice of all claims asserted in these proceedings. NP

05/28 2886 Copy of On Appeal from the USDC for the Eastern District of New York, Brief for the U.S., in the US Court of Appeals for the 2nd Circuit, Michael F. Ryan, et al -v- Dow Chemical Co., et al. Defts., Third-Party Pltfs., Appelles, dtd. 5/22/84. NP

05/29 2887 Appendix to above matter on appeal to Court of Appeals, 2nd Circuit. NP

05/29 2888 Ltr. dtd. 05/14/84 from H. David Blair, Esq. To B. Heineman, c/o/c. ack./m. NP

05/29 2889 Ltr. dtd. 5/14/84 from William S. Calli, Esq. To B. Heineman, c/o/c ack/m. NP

05/30 2890 By Weinstein, Ch. J.-Order dtd. 5/29/84 that all claims asserted in proceedings with respecdt to Agent White are hereby dismissed with prejudice. NP

05/30 2891 Ltr. dtd. 05/21/84 from John C. Sabetta, Esq., to JBW regarding Agent White, Dow Chemical Co. and settlement agreement. See ltr. for details. NP

05/30 2892 Two file folders of individual ltrs. from veterans regardg. A.O. litigation with copy of ltr. sent by JBW's chambers

acknowledging receipt of each ltr. attached. 05/29/84 NP

05/30 2893 File folder of individual ltrs. from vets regardg. A.O. litigation with copy of ltr. sent by JBW's chambers acknowledging receipt of each ltr. attached. NP

05/30 2894 Stenographer's transcripts dtd. 05/29/84 at 2:00 p.m. before JBW. NP

05/30 2895 Response of Agent Orange Pltfs. Management Committee to Waga & Spinelli's intervening motion. NP

06/11 2896 Plaintiffs' Motion for Approval of Settlement and for entry of an order concerning Notice and Hearing with respect thereto, dtd. 6/11/84. CV 79-747. NP

06/11 2897 Settlement Agreement, dtd. 6/11/84. CV 79-747 NP

06/11 2898 By Weinstein Ch. J. - Order dtd. 6/11/85 Order concerning notice to class members, and hearing on proposed settlement. See order for details. CV 79-747. NP

06/11 2899 Notice of proposed settlement of class action, 79 C 747, 06/11/84. NP

06/11 2900 Notice of propsed settlement of class action, 79 C 747, 06/11/84.

06/11 2901 Special notice to persons who have filed exclusion request forms in the Agent Orange litigation, 06/11/84. 79 C 747 NP

* * * *

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Continuation: Any claims must be filed with the court which will pass on the claims. Use the forms approved by the Magistrate. Mr. Shimek, Jr. so notified. NP

8/12 3556 Copy filed 07/02/84 from U.S. Crt. Of

Appeals Second Circuit of ORDER that the stay previously granted by a panel of this court be and it hereby is continued to and including the determination of appeal. Order dtd. 6/22/84. NP

8/12 3557 Copy of Order from U.S. Crt. of Appeals 2nd Circuit dtd. 06/14/84 and filed 07/02/84 with clk., that Petition by U.S.A. for rehearing in 84-3021 is denied. See order for details. NP

8/12 3558 Copy of Notice of Motion for Expedited Ruling on Petition for Rehearing (& en banc suggestion) (see doc. # 3557) dated 6/14/84 from U.S. Crt. Of Appeals C of A Order states: Motion for stay considered to be moot. NP

8/12 3559 Copy of Notice of Motion for Leave to File an Oversized Memorandum, from U.S. Crt. Of Appeals 2nd Circuit - 84-3021 84-8034 (Crt. Of Appeals #'s). NP

8/12 File received from USDC Eastern District of Pennsylvania Case docket No. CV 84-2526; Cynthia McCarthy, et al. -v- Dow Chem. Co., et al. Ack./mld. NP

0812 File received from USDC Southern District of Mississippi on 7/19/84. This office did not receive order from MDL Panel authorizing transfer until 07/18/84.

8/13 3560 Ltr. dtd. 07/18/84 from Judith L. Spanier, Esq., to JBW. SEALED NP

8/13 3561 By Weinstein, Ch. J. - Admnistrative Order No. 5 - authorization for Clerk of the Court to pay Special Masters Kenneth R. Feinberg, Esq., Leonard Garment, Esq. And David I. Shapiro. NP

8/13 3562 By Weinstein, Ch. J. - Administrative Order No. 6 - Re: March of Dimes

proposal dtd. 07/25/84 and JBW's Order dtd. 08/02/84 concerning development of a plan for the evaluation of claims. JBW authorizes the March of Dimes to develop plans and submit vouchers which are to be approved in advance of payment. See order for specifics. NP

8/13 3563 Ltr. dtd. 08/09/84 from Kenneth R. Feinberg, Esq. to JBW regarding request for payment of services rendered. See ltr for specifics. NP

8/13 3564 Agent Orange Litigation Settlement Questionnaire which was returnable to: Greenwald and Thompson, P.C. of Los Angeles, Ca., was filed with this office by a Vietnam Veteran (Name unreadable) from Springfield, Mass. NP

08/13 3565 Stenographer's transcripts dtd. 08/08/84 before JBW at 10:00 a.m. NP

08/13 3566 Stenographer's transcripts dtd. 08/09/84 before JBW at 10:00 a.m. NP

08/13 3567 Stenographer's transcripts dtd. 08/10/84 before JBW at 10:00 a.m. NP

U.S. District Court
New York Eastern (Brooklyn)
CIVIL DOCKET FOR CASE #: 98-CV-6383
Isaacson, et al v. Dow Chemical Co., et al

Filed: 10/20/98
Assigned to: Judge Jack B. Weinstein
Demand: $0,000
Nature of Suit: 890
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in Dist. of NJ : is 3:98-3988
Cause: 28:1331 Fed. Question: Tort Action

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
10/20/98	1	LETTER dated September 28,1998 from Judicial Panel On Multidistrict Litigation to Judge Weinstein with Conditional Transfer Order attached (fxc) [Entry date 10/26/98]
2/18/99	2	Certified Conditional transfer order filed. Request for file mailed. (rj) [Entry date 02/18/99]
3/4/99	3	NOTICE of voluntary dismissal dtd. 2/19/99 By JBW dtd. 3/2/99 Close the case (rj) [Entry date 03/04/99]
3/10/99	4	LETTER dated 2/26/99 from Mark R Cuker to JBW enclosed voluntry dismissal. (rj) [Entry date 03/10/99]
3/18/99	5	LETTER dated Feb. 26, 1999, from U.S.D.C., Dist. of New Jersey, sending us their file. Their case number is Civil-98-3988 (AET). (tv) [Entry date 03/18/99]

7/8/99	6	Calendar entry:,Before Judge Weinstein Civil Cause for status conf. Ct Rep. Dom Tursi For pltff. Ron Simon Stephen Murray For deft. Stephen Brock et al.Case called. Counsel for all sides pres. Motions to be filed and fully briefed by 9/27/99. set motion conference for 9:30 10/7/99 before Judge Jack B. Weinstein (rj)[Entry date 07/13/99]
9/22/99	7	ORDER APPROVEDOn ltr. dtd. 9/10/99 from Steven Brock motion fopr 12/13/99 @ 10:00 (signed by Judge Jack B. Weinstein , on 9/13/99) (rj) [Entry date 09/22/99]
10/18/99	8	MOTION by Dow Chemical Co., Monsanto Co., Hercules Inc., Occidental Chemical, Ultramar Diamond Sha, Maxus Energy Corp., Chemical Land Holdin, T-H Agriculture & Nu, Thompson Hayward, Harcros Chemical, Uniroyal, Inc., C.D.U. Holding Inc., Uniroyal Chemical to dismiss, Motion hearing set for 10:00 12/13/99 [8-1] motion (rj) [Entry date 10/18/99]
10/18/99	9	MEMORANDUM by Dow Chemical Co., Monsanto Co., Hercules Inc., Occidental Chemical, Ultramar Diamond Sha, Maxus Energy Corp., Chemical Land Holdin, T-H Agriculture & Nu, Thompson Hayward, Harcros Chemical, Uniroyal, Inc., C.D.U. Holding Inc., Uniroyal Chemical in support of [8-1] motion to dismiss (rj) [Entry date 10/18/99]
10/18/99	10	AFFIDAVIT of STEVEN BROCK by Dow Chemical Co. Re:in support [8-1]

		motion to dismiss (rj) [Entry date 10/18/99]
11/16/99	--	RESPONSE by Phyllis Lisa Isaacson in opposition to [8-1] motion to dismiss (see 99 3056 # 6) (rj) [Entry date 11/16/99]
12/3/99	11	AFFIDAVIT of LAURA WELCH (rj) [Entry date 12/03/99]
12/3/99	12	RESPONSE by Phyllis Lisa Isaacson in opposition to [8-1] motion to dismiss (rj) [Entry date 12/03/99]
12/13/99	15	Calendar entry:Before Judge Weinstein Civil Cause for motion conf. on motion to dismiss. granting [8-1] motion to dismiss Court Reporter/ESR Burt Suizer Case called. Counsel for all sides pres.Motion argued. Order to be submitted by parties. (rj) [Entry date 12/16/99]
12/14/99	13	REPLY MEMORANDUM OF LAW by Dow Chemical Co. in further support [8-1] motion to dismiss (rj) [Entry date 12/14/99]
12/15/99	14	LETTER dated 12/9/99 from Philip D.Nykamp to Clerk of the Court copy of deft's reply memo. (rj) [Entry date 12/15/99]
2/17/00	16	ORDER, For the reasons stated orally on the record dismissing (signed by Judge Jack B. Weinstein , on 2/14/00) Copies mailed (rj) [Entry date 02/17/00]
2/17/00	--	Case closed (rj) [Entry date 02/17/00]
3/10/00	17	NOTICE OF APPEAL by Phyllis Lisa Isaacson, Joe Isaacson Pltffs/Appellants. Fee Paid $ 105.00 Receipt # 229631 [16-1] order dismissing. NOA served by the Clerk. Judge notified. C of A notified. (mcg) [Entry date 03/17/00]

3/17/00	--	Certified copy of docket sheet sent to USCA. [17-1] appeal (mcg) [Entry date 03/17/00]
4/13/00	18	ORDER & JUDGMENT The court heard argument on deft's motion to dismiss in the above action on 12/13/99. A copy of transcript of proceedings is attached. Upon consideration of that argument and all proceedings, motions, proceedings, and the full record in MDL 381 and in the above captioned actions, Deft's motion to dismiss is Granted. The complaints and any and all amendments shall be dismissed as against all deft's with prejudice, and without costs assessed to any party. (signed by Judge Jack B. Weinstein on 4/7/2000), (rj) [Entry date 04/13/00]
5/2/00	19	USCA Scheduling order: [17-1] appeal Appeal record due by 6/1/00 . USCA Number: 00-7311Appellant's brief due 6/8/00. Appellee's brief due 7.10.00. Argument set for 8/21/00. (lizv) [Entry date 05/10/00]
6/26/00	20	MANDATE OF USCA (certified copy) Re: [17-1] appeal. Stipulation withdrawing premature appeal. This stipulation shall not preclude any appeal from a final judgment. Certified: 6/20/00. Judge Notified. Ackn. mailed. USCA# 00-7311. (lizv) [Entry date 06/27/00]
8/23/00	21	MOTION by Joe Isaacson, Phyllis Lisa Isaacson for an order pursuant to Rule 54 (b), Motion hearing [21-1] motion motion file stamped: 8/23/2000 and mailed/served: 8/9/2000 (rj) [Entry date 08/23/00]

8/23/00	22	ORDER Final Judgment in favor of deft's. (signed by Judge Jack B. Weinstein ,on 8/16/2000) (rj) [Entry date 08/23/00]
8/25/00	23	NOTICE OF APPEAL by Phyllis Lisa Isaacson, Joe Isaacson Fee Paid $ 105.00 Receipt # 236196 [22-1] order. Affidavit of service attached. (mm) [Entry date 08/30/00]
8/30/00	--	Certified copy of docket sheet sent to USCA. [23-1] appeal (mm) [Entry date 08/30/00]
12/1/00	24	USCA Scheduling order: [23-1] appeal Appeal record due by 12/15/00 . USCA Number: 00-9120 Appellant's brief due 1/22/00. Appellee's brief due 1/22/01. Argument set for 3/5/01. (mcg) [Entry date 12/04/00]
5/6/02	25	Briefs and Petition for Rehearing and Rehearing En Banc filed in the Court of Appeals. (Regarding Civil Cases: 98-6383; 99-3056; Document #25 in 98-6383) (tl) [Entry date 05/07/02]
5/31/02	--	NOTICE: this matter will be placed on the court's calendar for status conference on 6.20.02 @ 11:00 a.m. (Signed by June Lowe, Case Manager, on 5.28.02). C/M-Ch SEE: civil case no. 98-cv-3056 doc. # 18, for further details. (cnb) [Entry date 05/31/02]
6/20/02	26	Calendar entry: Case called before Hon. Jack B. Weinstein on date of 06/20/02 for Status Conference. Counsel for both sides present. Conference held. Court Reporter/ESR M. Diamond (sl) [Entry date 07/02/02]

7/17/02	--	TRANSCRIPT of proceedings before USDJ Weinstein filed for date of 6.20.02; Counsel for all sides present. C/R: Frederick R. Guerino, C.S.R. SEE: Civil case no. 99-cv-3056, doc. # 20, for further details. (cnb) [Entry date 07/17/021
9/16/02	27	ORDER: motions to dismiss, for summary judgment and any other motions shall be made returnable on 10/25/2002. These old cases shall be promptly disposed of. (Signed by Judge Jack B. Weinstein, on 9/12/2002). C/M-CH (Also docketed in case no. 99-cv-3056). (cnb) [Entry date 09/17/02]
9/27/02	28	ORDER: the parties are directed to file motions for summary judgment or any other appropriate relief no later than 30 days after the completion of appellate procedure. (Signed by Judge Jack B. Weinstein, on 9/27/2002). C/M-CH (cnb) [Entry date 09/30/02]
10/1/02	--	In the Supreme Court of the U.S. In re: Agent Orange Product Liability Litigation: Dow Chemical Co., Monsanto Co., et. al. v. Daniel Raymond Stephenson et. al., On Petition for a Writ of Certiorari to the U.S.C.A. for the Second Circuit. *Originally docketed in case no. 99-cv-3056, doc. no. 22. (cnb) [Entry date 10/01/02]
10/8/02	29	MAIL RETURNED: Order, dated 9/27/2002, was returned on 10/08/2002. Addressed to: Mark Cuker, Esq., Williams & Cuker, Woodland Falls Corporate Park, 200 Lake Drive East Ste

		100. Cherry Hill, N.J. 08002. Returned w/notations: "RTS-not at this address." *Forwarded to June Lowe. (cnb) [Entry date 10/08/02]
10/24/02	--	LETTER dated 10/07/2002 from Mark R. Cuker to USDJ Weinstein advising that no motions will be filed or considered while a Petition for Certioriari w/the U.S Supreme Court is pending. Also, requesting that he be served w/all notices issued by the Court. [Address updated] SEE: case no. 99-cv-3056, doc. no. 25, for further details. (cnb) [Entry date 10/24/02]

U.S. District Court
New York Eastern (Brooklyn)
CIVIL DOCKET FOR CASE #: 99-CV-3056
Stephenson, et al v. Dow Chemical, et al

Filed: 06/01/99
Assigned to: Judge Jack B. Weinstein
Referred to: Magistrate John L. Caden
Demand: $0,000
Nature of Suit: 365
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in W.D. Louisiana : is 6:99-296
Cause: 28:1332 Diversity-Personal Injury

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
7/8/99	1	LETTER dated 4/28/99 from Michael J Beck to Mr Heinemann enclosed conditional transfer order filed in the panel on 4/12/99. (rj) [Entry date 07/08/99]
7/8/99	2	CONDITIONAL TRANSFER ORDER dtd. 4/28/99. Filed with request for file attached. (rj) [Entry date 07/08/99]
8/3/99	3	Entire Record recd from WD of Louisiana. (rj) [Entry date 08/03/99]
8/25/99	4	LETTER dated 7/6/99 from Steven Brock to June Lowe enclosed copy of conditional transfer order. (rj) [Entry date 08/25/99]
9/22/99	5	ORDER APPROVED On ltr. dtd. 9/10/99 from Steven Brock Motion hearing to dismiss on 12/13/99 @ 10:00. (signed by Judge Jack B. Weinstein , on 9/13/99) (rj) [Entry date 09/22/99]
10/18/99	--	MOTION by Dow Chemical, Monsanto

		Co., Hercules Inc., Occidental Chemical, Ultramar Diamond, Maxus Energy Corp., Chemical Land Holdin, T-H Agriculture & Nu, Thompson Hayward, Harcros Chemical Inc, Uniroyal, Inc., C.D.U.Holding, Inc., Uniroyal Chemical to dismiss, Motion hearing set for 10:00 12/13/99 [0-1] motion see document # 8 CV 98 6383 (rj) [Entry date 10/18/99]
10/18/99	--	MEMORANDUM by Dow Chemical, Monsanto Co., Hercules Inc., Occidental Chemical, Ultramar Diamond, Maxus Energy Corp., Chemical Land Holdin, T-H Agriculture & Nu, Thompson Hayward, Harcros Chemical Inc, Uniroyal, Inc., .D.U.Holding, Inc., Uniroyal Chemical in support of [0-1] motion to dismiss see document # 9 CV 98 6383 (rj) [Entry date 10/18/99]
10/18/99	--	AFFIDAVIT of STEVEN BROCK by Dow Chemical Re:in support [0-1] motion to dismiss see document # 10 CV 98 6383 (rj) [Entry date 10/18/99]
11/16/99	6	RESPONSE by Daniel Raymond Stephenson in opposition to [0-1] motion to dismiss (rj) [Entry date 11/16/99]
12/13/99	7	Calendar entry: Before Judge Weinstein Civil Cause for motion hearing Case called. Counsel for all sides pres. Motion argued. granting [0-1] motion to dismiss Court Reporter/ESR Burt Sulzer order to be submitted by parties. (rj) [Entry date 12/16/99]
2/18/00	8	ORDER, that for the reasons stated orally on the record, this case is dismissed. (Signed by Judge Jack B. Weinstein on 2/14/00) c/m (tj) [Entry date 02/18/001

2/18/00	--	Case closed (tj) [Entry date 02/18/00]
4/3/00	9	ORDER & JUDGMENT Deft's motion to dismiss is GRANTED. Complaint and any and all amendments shall be dismissed as against all deft's with prejudice and without costs assessed to any party. (signed by Judge Jack B. Weinstein, on 3/27/00), (rj) [Entry date 04/03/00]
4/7/00	10	NOTICE OF APPEAL by attorney for Daniel Raymond Stephenson Fee Paid $ 105.00 Receipt # 230770 [9-1] judgment order, [8-1] order dismissed. Certificate of service attached. (mm) [Entry date 04/12/00]
4/12/00	--	Certified copy of docket sheet sent to USCA. [10-1] appeal (mm) [Entry date 04/12/00]
4/13/00	11	ORDER & JUDGMENT The court heard argument on deft's motion to dismiss in the above-captioned actions on 12/13/1999. A copy of transcript of proceedings is attached hereto. Upon consideration of that argument and all pleadings, motions, proceedings, and the full record in MDL 381 and in the above-captioned actions. Deft's motion to dismiss is Granted. (signed by Judge Jack B. Weinstein , on 4/7/2000), (rj) [Entry date 04/13/00]
5/8/00	12	AMENDED NOTICE OF APPEAL by Daniel Raymond Stephenson, Susan Stephenson, Daniel Anthony Stephenson, Emily Elizabeth Stephenson [11-1] judgment order. These parties appeal to correct the caption of their case. Service made by Clerk. (mm) [Entry date 05/15/00]
5/15/00	--	Certified copy of docket sheet sent to USCA. [12-1] appeal (mm) [Entry date

05/15/00]

5/25/00 13 USCA Scheduling Order: [12-1] appeal Appeal record due by 6/19/00 . USCA Number: 00-7455 Appellant's brief due 6/21/00. Appellee's brief due 7/21/00. Argument set for 9/5/00. (mcg) [Entry date 05/25/00]

6/9/00 14 LETTER dated 11/12/99 from Stephen B. Murray, Jr., to Clerk of Court enclosing plaintiff's opposition papers. (tj) [Entry date 06/09/00]

8/18/00 -- Certified and transmitted (INDEX) record on appeal to U.S. Court of Appeals: [12-1] appeal, [10-1] appeal . Acknowledgment requested. (mcg) [Entry date 08/18/00]

8/29/00 15 Acknowledgment from USCA received for the (INDEX) re: [12-1] appeal, [10-1] appeal. Signed by TT. (mcg) [Entry date 08/29/00]

6/1/01 -- Certified and transmitted record on appeal to U.S. Court of Appeals: [12-1] appeal, [10-1] appeal . Acknowledgment requested. PLEASE NOTE: THIS RECORD IS BEING SENT TO VINCENZA SINGELTON AS PER HER REQUEST.IT CONTAINS THE FOLLOWING DOCUMENTS #'S 1-14. (mcg) [Entry date 06/01/01]

12/11/01 16 COPY OF OPINION sent from Chambers to be docketed (certified copy) Re: [12-1] appeal, [10-1] appeal. "...we hold that the prior Agent Orange settlement does not preclude these Plaintiffs from asserting their claims alleging injury due to Agent Orange exposure. Because these Plaintiffs were inadequately represented in the prior litigation, based on the Supreme Court's

teaching in Amchem and Ortiz, they were not proper parties to the litigation. We therefore vacate the District Court's dismissal and remand the case to the District Court for further proceedings consistant with this opinion. Please note: this document returned to Chambers. (mm) [Entry date 01/08/02]

4/26/02 17 NOTICE, that the above entitled matter will be placed on the court's calendar for status conference on 5.15.02 @ 9:30 a.m. (Signed by June Lowe, Case Manager, on 4.25.02). (cnb) [Entry date 04/26/02]

5/6/02 -- Briefs and Petition for Rehearing and Rehearing En Banc filed in the Court of Appeals. (Regarding Civil Cases: 98-6383; 99-3056; Document #25 in 98-6383) (tl) [Entry date 05/07/02]

5/31/02 18 NOTICE: this matter will be placed on the court's calendar for status conference on 6.20.02 @ 11:00 a.m. (Signed by June Lowe, Case Manager, on 5.28.02). C/M-Cj (cnb) [Entry date 05/31/02]

6/20/02 19 Calendar entry: Case called before Hon. Jack B. Weinstein on date of 06/20/02 for Status Conference. Counsel for both sides present. Conference held. Court Reporter/ESR M. Diamond (sl) [Entry date 07/02/02]

7/17/02 20 TRANSCRIPT of proceedings before USDJ Weinstein filed for date of 6.20.02; Counsel for all sides present. C/R: Frederick R. Guerino, C.S.R (cnb) [Entry date 07/17/021 [Edit date 07/17/02]

9/16/02 23 ORDER: motions to dismiss, for summary judgment and any other motions shall be made returnable on 10/25/2002. These old

cases shall be promptly disposed of. (Signed by Judge Jack B. Weinstein, on 9/12/2002). C/M-CH (Also docketed in case no. 98-cv-6383). (cnb) [Entry date 09/17/02]

10/4/02 24 LETTER dated 9/19/2002 from Esteban Arevalo, Jr. to USDJ Weinstein requesting a copy of "the complaint that Stephenson v. Dow Chemical filed in this court." (cnb) [Entry date 10/04/02]

9/27/02 -- ORDER: the parties are directed to file motions for summary judgment or any other appropriate relief no later than 30 days after the completion of appellate procedure. (Signed by Judge Jack B. Weinstein, on 9/27/2002). C/M-CH *Originally docketed in case no. 98-cv-6383, doc. no. 28. (cnb) [Entry date 09/30/02]

10/1/02 22 In the Supreme Court of the U.S. In re: Agent Orange Product Liability Litigation: Dow Chemical Co., Monsanto Co., et. al. v. Daniel Raymond Stephenson et. al., On Petition for a Writ of Certiorari to the U.S.C.A. for the Second Circuit. (Also docketed in 98-cv-6383). (cnb) [Entry date 10/01/02]

10/4/02 24 LETTER dated 10/03/2002 from Robert C. Heinemann to Mr. Arevalo enclosing a copy of the petition for certiorari, filed on 10/01/2002, & a copy of the docket sheet. (w/o encl.) (cnb) [Entry date 10/04/02]

10/8/02 -- MAIL RETURNED: Order, dated 9/27/2002, was returned on 10/08/2002. Addressed to: Mark Cuker, Esq., Williams & Cuker, Woodland Falls Corporate Park, 200 Lake Drive East Ste 100. Cherry Hill, N.J. 08002. Returned w/notations: "RTS-not at this address." *SEE: case no. 98-cv-6383,

doc. no. 29, for further details. (cnb) [Entry date 10/08/02]

10/22/02 25 LETTER dated 10/07/2002 from Mark R. Cuker to USDJ Weinstein advising that no motions will be filed or considered while a Petition for Certioriari w/the U.S Supreme Court is pending. Also, requesting that he be served w/all notices issued by the Court. [Address updated] (cnb) [Entry date 10/24/02]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

THIRD AMENDED VERIFIED COMPLAINT

This master paper submitted by

Victor John Yannacone, Jr.

YANNACONE & YANNACONE
Professional Corporation
Plaintiffs' Attorneys
Office & P. O. Address
Post Office Drawer #109
Patchogue, New York 11772
(area code 516) 654-2299

79-10-15

THIRD AMENDED VERIFIED COMPLAINT
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THIRD
AMENDED VERIFIED COMPLAINT

PLAINTIFFS DEMAND TRIAL BY JURY

In the matter of the claims for equitable relief and damages brought by veterans of the War in Southeast Asia who are still alive; wives of those veterans who are still alive; veterans now deceased; widows of veterans now deceased; parents of veterans now deceased; and children of those veterans; jointly and severally, against THE DOW CHEMICAL COMPANY, HERCULES INCORPORATED, DIAMOND SHAMROCK CORPORATION, MONSANTO CO., and THOMPSON-HAYWARD CHEMICAL COMPANY, the plaintiffs allege the following by their attorneys:

Venue

1. The venue of this action has been determined under the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

General Jurisdiction

2. Jurisdiction of this Court is invoked under Title 28 United States Code §1331 and the amount in controversy herein exceeds the sum or value of $10,000 exclusive of interest and costs, and this cause of action arises under the Constitution, laws or treaties of the United States, as more fully and at length hereinafter set forth and alleged.

3. Upon information and belief, the "corporate defendants" have violated the common law and/or the statutory laws of the United States of America and while engaged in interstate commerce, laws of the several states, in manufacturing and marketing phenoxy herbicides such as the 2,4,5-trichloro-phenoxy aliphatics contaminated with the toxic synthetic organic chemical 2,3,7,8-tetrachloro dibenzo o-dioxin (TCDD or "Dioxin") since such contaminated herbicides were. and still are, inherently dangerous and unsafe for use.

4. Among the statutes from which a cause of action can be implied are:

(a) Federal Insecticide, Fungicide and Rodenticide Act (FIFRA):

(b) The Federal Environmental Pesticide Control Act

(c) The Toxic Substances Control Act (TOSCA);

(d) The Consumer Product Safety Act (CPSA).

Equitable Jurisdiction

5. This action is brought in equity before this court on certain grounds, among them:

6. The subject matter of this action is essentially equitable in nature.

7. This action is brought for the purpose of restraining the "corporate defendants" from doing further serious, permanent and irreparable injury to the individual plaintiffs and the class of plaintiffs and in order to provide adequate compensation and related affirmative relief for damages

already inflicted, and to dissipate the effects of the defendants wrongful conduct as alleged herein.

8. The declaratory judgment and injunctive relief demanded on behalf of the class are equitable remedies and the substantive character of the rights sought to be enforced by the Plaintiff are historically resolved in a court of equity.

9. Upon a finding that the "corporate defendants" are liable for damages to the plaintiffs, this action is brought to create a trust fund out of the current earnings of the defendants in the nature of a reserve against the claims of all the individual members of the plaintiff class to insure that the compensation of any group of individual plaintiffs will not impair the rights of those not before the Court at that time.

10. There is no plain, adequate and complete remedy at law as practical and efficient as the equitable relief sought herein, since the damages sustained by the individuals and the class on whose behalf this action is brought requires equitable relief in the form of a permanent injunction prohibiting defendants from manufacture distribution and sale of contaminated herbicides so as to prevent further injury by means of continued exposure to those plaintiffs already injured as well as the compelling need to diminish the risk of injury to those already at risk as a result of their prior exposure.

Class Action Allegations

11. Plaintiffs assert this action is maintainable as a "class action" under the provisions of Rule 23(b)(1)(A), Rule 23(b)(1)(B). Rule 23(b)(2), and Rule 23(b)(3).

12. Upon information and belief, that during the period from 1962 through 1971, approximately 2.4 million American servicemen were exposed to contaminated herbicides manufactured and marketed by the "corporate defendants" for use in Southeast Asia.

13. Upon information and belief, many servicemen, now veterans, have manifested symptoms of such exposure.

14. Upon information and belief, it is therefore reasonable to expect numerous additional claims will be made in the future by individuals so unfortunate as to be similarly afflicted, and it will be necessary for this Court to retain jurisdiction over the class in order to assure equitable distribution of the assets of the "corporate defendants" in satisfaction of all the judgments which may be entered against them.

15. Upon information and belief, the combined liquid assets of the "corporate defendants" will be insufficient to fully compensate the entire class of plaintiffs.

16. The claims of the plaintiffs are representative of the claims of all the members of the class as a result of the toxic effects of contaminated herbicides.

17. There are fifteen groups of plaintiffs which may *be* identified within the entire class of plaintiff veterans and their families and treated as subclasses under Rule 23:

(a) Plaintiff Class 1. Veterans with symptoms;

(b) Plaintiff Class 2. Veterans with symptoms and evidence of genetic damage;

(c) Plaintiff Class 3. Living Veterans without symptoms but with evidence of genetic damage;

(d) Plaintiff Class 4. Living Veterans without symptoms but at risk of genetic and somatic damage;

(e) Plaintiff Class 5. Deceased Veterans;

(f) Plaintiff Class 6. Wives of Veterans claiming loss of society, comfort, companionship, services, and support;

(g) Plaintiff Class 7. Wives of Veterans claiming loss of consortium;

(h) Plaintiff Class 8. Widows of Veterans.

(i) Plaintiff 9. Parents of Deceased Veterans;

(j) Plaintiff Class 10. Veterans and their wives as parents;

(k) Plaintiff Class 11. Veterans and their wives as parents of children who were stillborn or died while still infants;

(l) Plaintiff Class 12. Veterans and their wives as parents of children lost through miscarriage and spontaneous abortion;

(m) Plaintiff Class 13. Veterans' children at risk of genetic damage;

(n) Plaintiff Class 14. Veterans' children afflicted with genetic and somatic damage;

(o) Plaintiff Class 15. Veterans' children claiming loss of parental guidance and support.

A list of the names and addresses of each said plaintiff claimed to be an identified member of each said class is annexed hereto and made a part of this Complaint.

18. It is possible to establish criteria for identification of each individual class member by reference to records maintained in the regular course of governmental operations by various agencies of the United States of America, in particular, the Department of Defense, the Veterans Administration and the Department of Health, Education and Welfare.

19. Members of the class are fairly and adequately represented by counsel for the plaintiffs and neither the individual plaintiffs named at this time nor the attorneys for said plaintiffs so named have any interests adverse to those of any individual members of the class of all those who might be entitled to the relief sought herein.

20. There are substantial questions of law and fact common to the class.

21. The questions of law common to the class of all those who have already been affected, or are now or will be subject to the toxic effects of products manufactured and marketed by the "corporate defendants" herein, although

known to be contaminated with toxic synthetic organic chemicals include, but are not limited to:

(a) the joint and several liability of defendants;

(b) the nature and extent of the legal and fiduciary obligations of defendants, by reason of their economic power and technological resources owed plaintiffs and all others during this generation and succeeding generations;

(c) the remedy to be fashioned by the Court to redress the wrongs committed by defendants upon the plaintiffs, and all others similarly afflicted, or at risk of such affictions; and

(d) the appropriate measure of damages.

22. The questions of fact common to the class of all those who have already been affected, or are now or will be subject to the toxic effects of products manufactured and marketed, individually and collectively, by the "corporate defendants" herein although known to be contaminated with toxic synthetic organic chemicals include, but are not limited to:

(a) the extent of the toxic effects attributable to such products that were contaminated with polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs);

(b) the characteristics of such toxic effects manifested in human beings;

(c) the permanence of such toxic effects; and

(d) the extension of toxic effects through genetic and somatic damage to succeeding generations.

AS AND FOR A
FIRST CAUSE OF ACTION
PLAINTIFFS ALLEGE:
STRICT PRODUCT LIABILITY

23. That all the plaintiff veterans (Plaintiff Class 1, Plaintiff Class 2, Plaintiff Class 3, Plaintiff Class 4, Plaintiff Class 5, Plaintiff Class 10, Plaintiff Class 11, and Plaintiff Class 12) were members of the armed forces of the United

States and were exposed in Southeast Asia to herbicides contaminated as alleged herein.

24. That each plaintiff and each member of the plaintiff of class, has suffered injury, has been damaged, and some of said plaintiffs have already died, as a result of a number of ills and maladies, including malignant conditions, resulting from, aggravated by, or in some other way attributable to exposure to the contaminated herbicides as aforesaid.

25. Upon information and belief, that at least since 1962, and continuing to date, each of the "corporate defendants" THE DOW CHEMICAL COMPANY, HERCULES INCORPORATED, DIAMOND SHAMROCK CORPORATION, MONSANTO CO., and THOMPSON-HAYWARD CHEMICAL COMPANY (herein referred to as the "corporate defendants") manufactured and marketed. phenoxy herbicides such as the 2,4,5-trichlorophenoxy aliphatics for use in Southeast Asia, the United States, and throughout the rest of the world.

26. Upon information and belief, that at all the times herein mentioned, the aforementioned phenoxy herbicides were and still are contaminated with toxic synthetic organic chemicals such as polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs), and by reason of such contamination, defective.

27. Upon information and belief, that at all the times herein mentioned, the "corporate defendants" knew that the aforementioned phenoxy herbicides contaminated with toxic synthetic organic chemicals such as polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs) were inherently dangerous.

28. That the ""corporate defendants", by reason of their economic power, technological resources, and proprietary knowledge are, and have been, trustees of the public health, safety, and welfare and the health, safety and welfare of the Plaintiffs and all those others similarly situated and exposed to contaminated herbicides which they manufactured and

marketed, knew or should have known about the contamination of their products and that such contamination could cause human injury.

29. To the extent that the "corporate defendants" knew, or with the exercise of reasonable care and concern for the public health, safety and welfare should have, with reasonable diligence, known, that the herbicides they manufactured and marketed, were contaminated which could cause human injury said "corporate defendants" were under a non-delegable duty to do whatever was necessary and within their economic power and technologic resources to protect the public health, safety and welfare in general and the health, safety and welfare of the plaintiffs in particular, including, but not limited to warning those who might be exposed to the contaminated herbicides of the dangers inherent in such exposure.

30. Upon information and belief, the aforesaid herbicides were and still are inherently dangerous and thereby defective to the extent that such herbicides were and still are contaminated with toxic synthetic organic chemicals, and by reason of such contamination dangerous when used.

31. That the "corporate defendants" knew that the contaminated herbicides they manufactured and marketed, were to be used and would be used without substantial change and as a result of such intended use the plaintiff veterans would be exposed to toxic synthetic organic chemicals as aforesaid.

32. That there is a great disparity in economic and technological resources between the individual plaintiff veterans and the multi-national conglomerate ""corporate defendants".

33. That as a result of the conduct of the "corporate defendants" complained of herein, the plaintiffs sustained serious and severe injuries as a result of which they have suffered grievous personal injury and have become ill and disabled, suffered pain and economic loss, and in certain

cases have died; incurred medical expenses and other economic loss.

34. That as a result of exposure to products manufactured and marketed by the "corporate defendants" although such products were known to said "corporate defendants" to be contaminated as aforesaid, plaintiffs and all others so unfortunate as to be similarly situated and at risk have sustained and, upon information and belief, will sustain further, general and special damages.

AS AND FOR A
SECOND CAUSE OF ACTION
PLAINTIFFS ALLEGE:
NEGLIGENCE

35. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through "34" of this Complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

36. Although, upon information and belief, the "corporate defendants" knew, or with the exercise of reasonable concern for the public health, safety, and welfare should have known, of the dangerous properties and toxic characteristics of polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs), nevertheless said "corporate defendants" failed to warn the plaintiffs and others of the risks associated with exposure to those toxicants.

37. Upon information and belief, the "corporate defendants," by and through their agents, servants and employees were negligent, reckless and careless, and failed to exercise reasonable care and caution or demonstrate concern for the public health, safety and welfare commensurate with the economic power and technological resources of said "corporate defendants" when they failed to warn plaintiffs and others of the danger to which they were exposed.

38. Upon information and belief, the "corporate defendants" manufactured and marketed products contaminated with toxic synthetic organic chemicals in wilful, wanton, and reckless disregard of the public health, safety and welfare and the health, safety, and welfare of the plaintiffs herein and others as aforesaid.

AS AND FOR A
THIRD CAUSE OF ACTION
PLAINTIFFS ALLEGE:
BREACH OF WARRANTY

39. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through "34" of this Complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

40. Upon information and belief, the "corporate defendants" expressly and impliedly warranted that persons such as plaintiff veterans and others whom they knew or should have known would be exposed to contaminated herbicides would be safe from personal injury attributable to such exposure.

AS AND FOR A
FOURTH CAUSE OF ACTION
PLAINTIFFS ALLEGE:
INTENTIONAL TORT

41. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through "34" of this Complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

42. The Plaintiffs seek judgment DECLARING that continued manufacture and marketing of phenoxy herbicides such as the 2,4,5-trichlorophenoxy aliphatics, pentachlorophenol (PCP) and its salts by the "corporate defendants", individually or collectively, although known by said "corporate defendants" to be contaminated with toxic synthetic organic chemicals such as polychlorinated dibenzo-

p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs) is an intentional tort.

AS AND FOR A
FIFTH CAUSE OF ACTION
PLAINTIFFS ALLEGE:
IN EQUITY

43. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through "34" of this complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

44. Upon information and belief, the "corporate defendants", have steadfastly refused or failed to remove consumer products, known to be contaminated with toxic synthetic organic chemicals from international and interstate commerce and local markets although said "corporate defendants" know, or with reasonable concern for the public health, safety and welfare should know, of the danger associated with exposure to such contaminated products.

45. That the the contamination of consumer products, as aforesaid presents a significant continuing risk of harm to plaintiffs and others.

46. Upon information and belief, unless restrained by this Court, the "corporate defendants," their subsidiaries, associated venturers, agents and employees, will continue to manufacture and market, products contaminated as aforesaid.

47. That the continued manufacture and marketing of contaminated products by the "corporate defendants," although known by them to be contaminated with toxic synthetic organic chemicals, presents an imminent danger of serious, permanent, and irreparable damage to the public health, safety and welfare in general and the health, safety and welfare of the plaintiffs in particular.

48. That the continued manufacture and marketing of contaminated consumer products by the "corporate defendants" although such products are known to said

"corporate defendants" to be so contaminated, is a continuing tort affecting all the individual plaintiffs still alive and others.

49. That the continued manufacturing and marketing of consumer products by the "corporate defendants" although such products are known to said "corporate defendants" to be contaminated with toxic synthetic organic chemicals, is a continuous and continuing nuisance.

AS AND FOR A
SIXTH CAUSE OF ACTION
PLAINTIFFS ALLEGE:
NUISANCE

50. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through "49" of this Complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

51. That the illness and disability of the plaintiffs is attributable to, resulted from, or has been aggravated by, the maintenance of a continuous and continuing nuisance by the "corporate defendants" which manufactured and marketed products known to be contaminated with toxic synthetic organic chemicals in wanton and reckless disregard of the public health, safety and welfare.

52. That the illness and disability of the plaintiffs is attributable to, resulted from, or has been aggravated by, the intentional acts of the "corporate defendants" which manufactured and marketed products known to be contaminated with toxic synthetic organic chemicals in wanton and reckless disregard of the public health, safety and welfare.

AS AND FOR A
SEVENTH CAUSE OF ACTION
PLAINTIFFS ALLEGE:
DECLARATORY JUDGMENT CLAIMS

53. Plaintiffs repeat, reiterate and reallege each and every allegation of those paragraphs designated "23" through

"52" of this Complaint with the same force and effect as if the same were here fully and at large set forth and alleged.

54. This is a proceeding seeking a Judgment declaring the rights and legal relations of the parties to the matter in controversy as more specifically set forth.

55. The Plaintiffs seek judgment DECLARING their rights and the rights of all the people of the United States to the protection of their personal health, safety and welfare from the toxic effects of phenoxy herbicides manufactured and marketed by the "corporate defendants".

56. The Plaintiffs seek judgment DECLARING their rights and the rights of all the people of the United States, not only of this generation but of those generations yet unborn, to have the "corporate defendants", their several subsidiaries, associated business venturers, agents, and employees, by reason of their economic stature and technological resources, protect the public health, safety and welfare to the extent of eliminating the manufacture and marketing of products contaminated with toxic synthetic organic chemicals such as polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs).

57. The Plaintiffs seek judgment DECLARING their rights and the rights of all the people of the United States, not only of this generation, but of those generations yet unborn, to protection of their personal health, safety and welfare, and their Environment (considered as the complex system resulting from the interactions among natural, social, and societal resources and the natural, social, and societal processes operative upon those resources) from damage or degradation attributable to the toxic effects of contaminated herbicides manufactured and marketed by the "corporate defendants."

58. The Plaintiffs seek judgment DECLARING that manufacturing and marketing phenoxy herbicides such as the 2,4,5-trichlorophenoxy aliphatics, pentachlorophenol (PCP) and its salts contaminated with toxic synthetic organic

chemicals such as polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs) by the "corporate defendants" has represented, now still represents, and will continue to represent for some indeterminate future time (the duration of which depends upon the time necessary for natural or human processes to detoxify such toxic synthetic organic chemicals) a threat to the public health, safety and welfare and that such a threat violates the rights retained by the plaintiffs and all the people of the United States not only of this generation, but of those generations yet unborn, under the Ninth Amendment of the Constitution of the United States, and as such protected under the "due process" and "equal protection" clauses of the Fifth Amendment and the "due process," "equal protection," and "privileges or immunities" clauses of the Fourteenth Amendment of the Constitution of the United States.

59. Plaintiffs seek judgment DECLARING that the "corporate defendants," by reason of their economic stature and technological resources, are Trustees of the public health, safety and welfare to the extent that such "corporate defendants" actually had, or now have, or with the exercise of reasonable concern for the public health, safety and welfare should have had or now should have, knowledge of the dangerous properties and toxic characteristics of the products they manufacture and market as herein alleged.

60. Plaintiffs seek judgment DECLARING that continued promotion of phenoxy herbicides by the "corporate defendants", although known by them to be contaminated with toxic synthetic organic chemicals is a breach of the fiduciary duty and obligation owed to plaintiffs by said "corporate defendants" because of their economic stature and technological resources, and as such is actionable by the Plaintiffs against said "corporate defendants" in Equity.

WHEREFORE the Plaintiffs, individually and collectively demand judgment of the corporate defendants, THE DOW CHEMICAL COMPANY, HERCULES

INCORPORATED, DIAMOND SHAMROCK CORPORATION, MONSANTO CO., and THOMPSON-HAYWARD CHEMICAL COMPANY for the equitable relief and damages heretofore stated, all together with such other and further relief as to this Court shall seem just and proper under the circumstances.

DATED: Patchogue, New York
14 October 1979

/s/ Victor John Yannacone, Jr.
Victor John Yannacone, Jr.

YANNACONE & YANNACONE
Professional Corporation
Plaintiffs' Attorneys
Office & P. O. Address
Post Office Drawer #109
Patchogue, New York 11772
(area code 516) 654-2299

VERIFICATION

STATE OF NEW YORK)
COUNTY OF SUFFOLK)

MICHAEL F. RYAN and MAUREEN O'CONNOR RYAN, each severally being duly sworn, depose and say that they are each individual plaintiffs in this action and that they bring this action also as the parents of KERRY ANN RYAN, an infant under the age of fourteen years, and as representatives of all those so unfortunate as to be similarly afflicted and that they have read the foregoing THIRD AMENDED COMPLAINT and know the contents thereof, that the same are true as to their own knowledge except as to those portions therein alleged upon information and belief, and as to those portions they believe them to be true.

/s/ Michael F. Ryan
MICHAEL F. RYAN

/s/ Maureen O'Connor Ryan
MAUREEN O'CONNOR RYAN

Sworn to before me, this
14th day of October, 1979

/s/ Victor John Yannacone, Jr.
Victor John Yannacone, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

PLAINTIFFS' REPLY MEMORANDUM ON CLASS CERTIFICATION

[Filed Oct. 17, 1979]
[Excerpt]

EDWARD F. HAYES, III
Malerba, Abruzzo, Clancy, Hayes, Downes & Frankel
434 New York Avenue, Huntington, New York 11746
IRVING LIKE
Reilly & Like
200 West Main Street, Babylon, New York 11702
HYMAN HERMAN
Abrams & Herman
163 Half Hollow Road, Deer Park, New York 11729
ALBERT J. FIORELLA
1565 Franklin Avenue, Mineola, New York 11501
EUGENE J. O'BRIEN
Burke, Curry, Hamil & O'Brien
138 Mineola Boulevard, Mineaola, New York 11501
W. KEITH KAVENAGH
South Gillette Avenue, Bayport, New York 11705

/s/ Victor John Yannacone, Jr.
Victor John Yannacone, Jr.
YANNACONE & YANNACONE
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79-10-17

* * * *

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RULE 23(a)(3) - TYPICALITY

"Typicality," in the context of FRCP Rule 23, refers to the general character of the claim of the named plaintiffs in relation to the class of all the claims sought to be represented. Factual identity between the claims of the named plaintiff and those of the class as a whole has never been required to fulfill the conditions of typicality. Although corporate defendants would reply upon *Amswiss International v. Heublein, Inc.*,69 FRD 663, 667 (ND Ga 1975) to support their challenge to class certification, that court succinctly defines the typicality requirement of Rule 23(a) as being satisfied if, "in the course of proving its own claim plaintiff also proves the claim of the other members of the class."

The corporate defendants argue that it is "extremely unlikely that any veteran's claim is 'typical' of any other veteran's claim." (MDL381 D66, DOW Memorandum, p. 13). However, the fundamental issue of liability is common to every veteran of the armed conflict in Southeast Asia who was exposed to the contaminated herbicides manufactured and marketed by the corporate defendants. Each veteran was exposed to the contaminated herbicides in Southeast Asia and every veteran sustained some personal injury as a consequence of such exposure. While no two veterans may have been damaged to the same extent by exposure to contami- **[Page 22]** nated herbicides, plaintiffs have offered to prove that the symptoms with any exposure to contaminated herbicides (dioxin effects) are well-defined. Therefore, as to the liability of the corporate defendants and the general criteria for determination of plaintiffs' injuries and assessment of plaintiffs' general damages, the claims of

the representative plaintiffs are typical of those of the entire class of plaintiff veterans and their families and satisfy Rule 23(a)(3).

* * * *

Excerpt of Brief for Plaintiffs-Respondents filed in The United States Court of Appeals for the Second Circuit, in *In re Agent Orange Product Liability Litigation*, No. 80-7079

[Filed Apr. 11, 1980]

* * * *

[36] developmental defects among the veterans' children). Numbers are properly cognizable by the court in making a determination with respect to federal interests and the application of a nationwide federal rule of law in general.

The argument that it is illogical to base any distinction on a body-count of the plaintiff veterans and their families also overlooks the fact that the distinction is also heavily dependent on the conduct of the defendants. The allegations of TAVC, when established, will demonstrate that the corporate defendants committed a toxic tort of such magnitude as to be almost hitherto unknown to the Law. Such a tort committed by war contractors against thousands of American servicemen is quite a different thing, qualitatively, from the occasional defective shell, grenade or even ejection seat.

POINT IV.

It Was Within the Sound Discretion of the District Court to Decline at This Time to Strike Claims Made on Behalf of Certain Classes of Persons at Risk of Injury and for the Creation of a Trust fund.

The war contractors complain that the District Court declined to enter an immediate order striking certain paragraphs of the TAVC an dismissing any and all claims on behalf of those plaintiffs "at risk" of suffering damage in the future such as neoplastic disease (cancer) and birth defects among their unborn children as a result of the defect of contaminated phenoxy herbicides manufactured and

marketed by the corporate defendants. The war contractors are equally strident in their demand for an order striking the allegations of the complaint seeking to declare the corporate defendants, by reason of their **[37]** economic stature and technological resources, trustees of the public health, safety and welfare and impose on the corporate defendants a fiduciary obligation to warn of any evidence that a product they manufacture, formulate, advertise, promote, market or sell may be toxic to human beings or other animals.

The trial judge to whom multidistrict litigation has been assigned is delegated broad powers to control the progress of the case from the moment it is assigned. The gravamen of defendants' appeal is that the trial judge refused to rule on part of a motion to dismiss and that the presence of "at risk" classes and the demand for relief in the form of a trust fund will create confusion in connection with the proper definition of the dimensions and nature of the action, as well as the scope of discovery (Appellants' Brief 42, 44).

The difficulties envisaged by the war contractors on this point are speculative, at best. The trial court, in its wisdom, elected to defer ruling on this part of defendanrs' motions until, among other things, this Court passed on the question of federal jurisdiction, and the question of class certification was again before the trial court. It may be reasonably assumed from the extensive pre-trial conferences conducted by the Court on April 18, 1979, (A.IV. 2320); June 21, 1979; (A.III, 1176); July 18, 1979 (A.III, 1376); October 3, 1979 (A.II. 903); November 2, 1979 (A.III,1642); December 21, 1979, (A.III, 1687); January 16, 1980 (A.IV. 2155); and Febraury 1, 1980 (A.IV, 2175) that some development of the record and some disposition of the more than fifty affirmative defenses raised by the corporate defendants would be in order before the Court considers one of the most important aspects of the "Agent Orange" litigation -- the latency period in the development of clinical symptoms of neoplastic disease following exposure to a toxicant, and the time between manifestation of genetic damage in the tragic

case of children born with developmental defects **[38]** and the time when the genetic damage was done to their fathers.

Clearly the motions by the corporate defendants were premature and just another example of their frantic efforts to avoid discussion of the merits of the veterans claims of injury and damage as set forth in the several complaints (Complaint §§32-89, A.I., 41-55; Amended Verified Complaint (AVC) §§49-117, A.I. 275-295; Second AVC (SAVC) §§50-78, A.II. 807-818, 1006; Third AVC (TAVC) §§23-60, A.II. 1018-1030), and Offers of Proof (July 9, 1979, A.II. 603-626, 640-662, 689-691). The District Court took an appropriate course by deferring consideration of the corporate defendants motions until at least some of the merits of the veterans claims have been adjudicated. The war contractors have shown nothing arbitrary, capricious and unreasonable in the decision of the District Court.

The appeal of the war contractors on this point is little more than an attempt to take an interlocutory appeal from a class action determination that has not been made. Class action determinations, of course, are not ordinarily appealable on an interlocutory basis. Interlocutory appeals of class action determinations was fundamental to the entire action *Shelter Realty Corp v. Allied Maintenance Corp.*, 574 F.2d 656 (1978 CA2), as where the individual recovery would be so insignificant that the suit would not continue as a private action, *Master Key Antitrust Litigation*, 528 F.2d 5, 10-11 (1975 CSA2); where the class action issue is entirely separate and distinguishable from the main issues in the litigation, *Windham v. American Brands, Inc*, 565 F.2d 59 (1977 CA4); or where failure to determine the issue will result in "irreparable harm" to a litigant. The appeal on this point hardly qualifies for such treatment.

In arguing against the "at risk" claims in TAVC, the war contractors assume that no injury has been inflicted, **[39]** or that the consequences thereof will be too remote in time to establish a causal relationship. Both of these positions are

erroneous. The "injury" in the Agent Orange cases have already occurred. The plaintiffs "at risk" have already been exposed to the toxic substance. Only time will tell whether some vital cell within their body has become a ticking toxic time bomb which will explode into a cancer or contribute defective genes to a child who will come into the world burdened with the kind of catastrophic polygenetic developmental defets that have afflicted the infant plaintiff Kerry Ryan (79 CIV 747 USDC/EDNY).

Not all courts adhere to the rule an injury and damage are not compensable simply because they are not presently and immediately observable (Appellants' Brief at 46). In *Gomes v. Taylor*, (D.R.I. March 21 1979 No. 77-0228), for example, a state prison inmate was permitted to recover for the increased likelihood of contracting cancer due to blood tests performed by lawful authorities in the course of an investigation. Similarly, in *Payton v. Abbott Laboratories*, 83 F.R.D. 3832 (D. Mass. 1979, (a "DES" case similar to those cited by the war contractors, conditional certification of an"at risk" class was permitted absent a controlling determination that there was no cause of action whatever on behalf of the questioned class under controlled law. There has been no such determination in this case.

There are a number of decisions which hold that one is only "injured" in the legal sense when the accumulated effects of the deleterious substance manifest themselves. *Urie v. Thompson*, 337 U.S. 170 , 187 (1949); *Usery v. Turner Eikhorn Mining Co.*, 428 U.S. 1, 7-11 (1975); *Brush Beryllium v. Meckley*, 285 F.2d 797 (1960 CA6); *Hungerford v. United States*, 307 F.2d 99 (1962 CA9); *Cox v. Stanton*, 529 F.2d 47, 48 (1975 CA4); *Chemical Leaman v. Interstate Commerce Commission*, 593 F.2d 241 (197 CA3).

[40] That the "at risk" class is comprised primarily of infants gives special weight to the District Court's determination that the "at risk" claims should not be dismissed out of hand. *Bergstresser v. Mitchell*, 577 F.2d 22

(1978 CA8) holds that damage to the chromosomes of parents which appear as genetic deformities in children, even though such damage appears prior to conception, is a separate cause of action. *Accord*, *Woods v. Lancet*, 303 N.Y. 349,102 N.E.2d 691 (1951).

The Veterans' "at risk" claims are not without merit and therefore it was entirely within the competence of the District Court to reserve decision on their legal sufficiency until a later, more appropriate stage in this litigation. Much the same may be said for the "trust fund" allegations of the complaint.

The "trust fund" concept offers a solution to the most fundamental and vexing problems of modern litigation. As science and technology advance, there will undoubtedly be more cases of toxic torts as careless or uncaring corporate manufacturers distribute contaminated products without regard for the long term effects of the contaminants on man and the environment. It is for society to decide whether to leave the burden of an injury where it falls upon the victim as the price of the new technology, to provide sporadic compensation through application of the tort theories of another age, or to adapt those theories to the complexities and realities of modern society and to effect uniform compensation where such injuries are the result of the concerted activities of an industrial oligopoly.

If the concerted activities of the corporate defendants had been merely price fixing, and if the plaintiff veterans and their families were small business owners who had suffered economic loss, even if only measured in pennies, the door to the Courthouse would open under the anti-trust laws, and the bulk of the litigation would be conducted by

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381

United States Courthouse
Uniondale, Long Island
New York

August 24, 1982
10:30 o'clock, A.M.

Before:
HONORABLE SOL SCHREIBER, SPECIAL MASTER

[1462] SPECIAL MASTER: Why is it necessary that the entire 2.6, is it?

MR. YANNACONE: Yes.

SPECIAL MASTER: -- million be the parameter of the class?

MR. YANNACONE: That is the universe of the class that Judge Pratt has established. Those are all the people who can be Agent Orange plaintiffs.

SPECIAL MASTER: When did he establish that?

MR. YANNACONE: In Pretrial Order number 26. That's the parameter of the class.

There are only 2.46 -- only -- 2.46 million people who can be members of this class.

SPECIAL MASTER: Counsel, I would like a copy of that Pretrial Order.

Are you saying to me that the plaintiffs' position in this case is that they -- in order to have a B-3 class, you will undertake --

MR. YANNACONE: No.

SPECIAL MASTER: -- to notify 2.46 million people?

MR. YANNACONE: No.

MR. RIVKIN: That's our position, sir.

SPECIAL MASTER: Wait a second. I know that

* * * *

[1468] So with that, number one, it was my feeling that there should be no class but if in fact there is going to be a class, it should be a class that is fair, equitable and just to the veterans and to all parties.

So that as Mr. Yannacone says, anybody that was over there had an exposure. Whether it's true or not is immaterial. That's the contention.

How can you get the amount of people who are -- suffering from symptoms unless you notify them all and say all of you folks should be on notice that if any of you have the following.

You can't pick a man because he made a claim and say, because you made a claim, you should be part of this class, when next door neighbor might not have been -- have made a claim and is suffering from something which he believes came from an exposure.

So it is my contention, sir, that in accordance with the claim of the plaintiffs and the prior comments of the Judge, that the class is 2.46 or whatever it is and it is the plaintiffs' obligation, not the Government and not the Master or the Judge to find out how they are going to notify them.

SPECIAL MASTER: Oh, no, no.

[1469] MR. RIVKIN: Wait. Let me finish.

SPECIAL MASTER: No. Mr. Rivkin, remember, it is a class action. It is the responsibility of all parties to the case, plaintiffs, defendants, the Judge, the Master, to determine what is the appropriate and legal and fair way of handling a class.

MR. RIVKIN: I accept that.

SPECIAL MASTER: It is not the plaintiffs' position.

MR. RIVKIN: What I am saying, if the order came down that you must notify X amount of veterans, all those exposed, and it must be notified in this manner, whatever it may be, it is then you -- and you must notify by mail or otherwise, it is then up to the plaintiffs to get the list and do the mailing.

SPECIAL MASTER: I --

MR. RIVKIN: I don't think it is up to the Master or the Court or the Government, unless they voluntarily want to help out. They have no obligation to take the burden of the plaintiff who wants to be the class lead counsel to say where am I going to get the names from. He can't come on the one hand

* * * *

[1489] you recognize that this is unlike any other personal injury action that has been brought before the Courts of this country and we are insisting that the liability of the defendants extends to the entire class of 2.46 million people, limited only to those who are in the group and have manifest physiological or organic damage. What we are saying to you, we can identify a finite number of ill people today or dead veterans today or deformed children today. And that's the number which even by the most extreme reading of ***Eisen*** is all that actual notice must be given to. We are saying there is, however, a remainder in that class who between now and next June can develop the soft tissue sarcoma symptom that will make them clearly members of the class which could not

have been demonstrated today, but will make them death claims a short time afterwards.

Now, you are telling us to chose now. And this is the breath of our fiduciary obligation, which we -- we are just not going to do it, when you are telling us in an intellectual exercise to pick a method and chose a position.

SPECIAL MASTER: Counselor, wait a second.

MR. YANNACONE: We are not going to --

[1490] SPECIAL MASTER: The Court doesn't ask you to pick. The Court asks to comply with the law as developed.

Now, if you are suggesting that this case is so unique that the Court ought to re-develop the entire law of class actions and rule 23 and notice, that's an interesting hypothesis or interesting suggestion on your part. But the idea that the Court is telling you to pick -- the Court is ordering you to comply with the rules.

MR. YANNACONE: Judge --

SPECIAL MASTER: I mean if you are saying --

MR. YANNACONE: Do you want to put that in order.

SPECIAL MASTER: If you don't know what the rules are or we can't figure out what the rules are, then I am saying to you it's time we got to the point of deciding the issue.

MR. YANNACONE: Then decide it.

SPECIAL MASTER: Wait a second. Decide the issue. I want you to tell me, this Court, what you want the Court to do as far as notice. I said to you, prepare a notice and tell me how you are going to distribute it. You have an obligation

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[1499] added another 200 thousand or so.

MR. YANNACONE: There is another --

SPECIAL MASTER: What makes that group from the group of the 2.4? I don't understand.

MR. YANNACONE: The entire -- according to the government -- and we have only the government to go by, the names and addresses of the 2.46 million people who served in Vietnam are not ascertainable at this time through the means of searing the Federal Government files and records. They cannot identify who went to Vietnam. They might, given a great deal of money and a great deal of time, give us the names of the 8 million who served in the armed forces regardless of branch from 1962 to 1974. They would not be able to tell us the branch they served in except for the Marine Corps, or whether they served overseas or in Vietnam.

SPECIAL MASTER: So you now extended it from 2 point something to 8 million.

MR. YANNACONE: I haven't. I know what my class is. My class is those people who are ill among the 2.46 who went to Southeast Asia. We know now for a fact that we can identify through veteran service groups and 16 state veteran agencies a group

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[1520] couple of weeks to tell us where they stand with respect to the subpoena that was served, as well as the information that was being sought concerning the names and addresses of veterans.

MR. PAKULA: If there are to be meetings with the Government, may the defendants attend those meetings?

SPECIAL MASTER: The defendants should be attending all meetings with the Government.

MR. PAKULA: We -- this whole -- a lot of what happened this morning was based on representations that what the Government said at a meeting that none of the defendants attended.

SPECIAL MASTER: Let me see if I can -- I think both sides can approach the Government and speak to them separately. But I think we are getting to a point where the Government ought to be making statements and

representations to both sides in the same room, rather than to individual sides.

[1521] MR. PAKULA: Second thing is that the complaints in this case appear to be pleaded on behalf of at risk people without physiological ailments. A motion was made some time ago to dismiss claims of at risk people on the grounds that they didn't state a claim upon which relief could be based. Judge Pratt deferred the determination of that motion, really tabled it.

SPECIAL MASTER: Pending?

(continued on next page.)

[1522] MR. PAKULA: I am not sure what appears. I am not sure whether this case involves at risk plaintiffs who don't have physiological ailments or whether it does, and I think that should be resolved one way or the other, and soon.

SPECIAL MASTER: What is the defendants' position? They do not want at risk people in it?

MR. PAKULA: The defendants' position is that that -- to the extent the complaints, whichever sample complaint we were using as the complaint upon which the original motion practice was based, to the extent that they plead a claim on behalf of people that are not sick, that's not the claim upon which relief can be based. It is a defective claim. It should be dismissed.

SPECIAL MASTER: They will --

MR. PAKULA: That's the position of my client. I think all.

SPECIAL MASTER: Your position is that they will not be part of any class.

MR. PAKULA: Our position is that those claims, that the complaints don't state a cause of action, to use State Court language, which I find much easier to use. That has never been ruled upon, so we haven't gotten to the next question.

[1523] SPECIAL MASTER: Of course, if they are not part of the class, if the at risk people are not part of the class, then subject to the limitation periods in individual statutes, they may or may not have claims if they develop what they claim to be allegations of injury.

MR. PAKULA: I guess that's so.

MR. SILBERMAN: If and when there is a class certified, there is going to have to be a new class action complaint, which may or may not contain such claims and so which motions would have to be addressed.

SPECIAL MASTER: What do you mean if it is certified? I thought the Judge has already ruled.

MR. SILBERMAN: I don't know that it's been certified.

MR. GORDON: The Court has only conditionally --

SPECIAL MASTER: Certified?

MR. GORDON: Conditionally, conditionally certified it, asserting there would be a formal certification order later. At that time the new complaint would be served with representative plaintiffs.

[1524] SPECIAL MASTER: That's a good point.

MR. PAKULA: We don't know who the plaintiffs are.

MR. YANNACONE: Your Honor -

SPECIAL MASTER: Let me ask the plaintiffs. Are you, Mr. Yannacone, are you taking the position that this class should contain not only those with present injuries, but those who have been categorized as at risk, meaning they are susceptible of developing injuries further down the line?

MR. YANNACONE: Judge, at the risk of delivering a short lecture on the medicine in this case, the exposure to the toxicant produced a physiological event, an injury within the meaning of the word "injury" in the technical law of torts.

SPECIAL MASTER: Yes, I know. But what I am asking you -

MR. YANNACONE: The damage is not yet manifest. I will answer your question.

SPECIAL MASTER: Mr. Yannacone, it is always enjoyable to hear and to speak with you, but I wish, with all due respect, you answer the specific question,

Are you saying to me that you are forming a class here which are people who have no -- in other **[1525]** words, the seeds of future injury?

MR. YANNACONE: No. Judge, you must let us define our people.

SPECIAL MASTER: You cannot. Wait a second.

You can only -

MR. YANNACONE: Judge --

SPECIAL MASTER: You can only recommend. The Court decides. Mr. Yannacone, you cannot be both the advocate and the judge at the same time.

MR. YANNACONE: Your Honor, we made a choice and we are defining our people this way. You do not have to agree. You do not have to approve it. But our definition is this: if you were exposed to dioxin contaminated phenoxy herbicides -

SPECIAL MASTER: Okay. That's step number one.

MR. YANNACONE: You have suffered a physiological injury.

SPECIAL MASTER: Why?

MR. YANNACONE: Because of the medicine, the first exposure.

SPECIAL MASTER: You mean, anyone who was exposed to it?

MR. YANNACONE: We are prepared to establish **[1526]** by a fair preponderance of the substantial credible -

SPECIAL MASTER: Mr. Yannacone.

MR. YANNACONE: -- medical evidence -

SPECIAL MASTER: Why do you try to design a case that is so -- and I don't mean to be critical in saying -- when I say "design," -- that is so potentially -- everybody who was in Vietnam was exposed under your theory. Am I correct?

MR. YANNACONE: Judge -

SPECIAL MASTER: To it?

MR. YANNACONE. Not necessarily.

SPECIAL MASTER: Why not?

(continued on next page)

[1527] MR. YANNACONE: We have a model in this case. When this complaint was drafted, it was designed and Budd, Larner, of course, knows better than any other firm sitting on that side of the table. This was designed to avoid the problem of the asbestos litigation today.

We knew that Agent Orange --

SPECIAL MASTER: What is the problem of the asbestos?

MR. YANNACONE: The problem is that the medical evidence clearly indicates that the toxic physiological effect, the injury took place twenty years ago when the worker was first exposed to asbestos and the manifestation of that injury, the damage within the meaning of the law, occurs twenty or thirty years later.

SPECIAL MASTER: Okay. So your theory then is that anyone who was exposed, in effect, does not have a problem with the statute of limitations because he's already a viable member of the class and part of this case?

MR. YANNACONE: He's been injured in the technical sense of injury.

SPECIAL MASTER: What happens if this case **[1528]** is finally resolved a year from now or two years from now and you have been successful in withstanding the defendants' affirmative defense and you have been successful in showing fault, the cases are then redistributed throughout the United

States to various Federal Courts, to try, as you call it, individual causation and damages?

MR. YANNACONE: Porximate cause.

SPECIAL 14ASTER: Proximate cause and 15,000 at risk people are still members of the class but still are in an at risk position?

What are you saying to that court?

MR. YANNACONE: You're in exactly the position today and I'll give you a New York analogy, that we would like to point out. It's a catch-22 situation, but it exists in the New York law.

I represent a --

SPECIAL MASTER: No, no. With all due respect to the New York law, I do not want to hear about New York law.

I want you to tell me what will happen to 150,000 -

MR. YANNACONE: A decision will have to be made by the Court because the cause of action is **[1529]** this: I was exposed and I can prove I was exposed in Vietnam. I have not yet manifested any of the injuries, any of the damage. The clinical evidence of damage that might occur to me. And if you are in the State of New York you now have a phobia case. If you are in certain other states, you are now out of court.

SPECIAL MASTER: Wait a second. Wait.

I know the New York cases on phobia. They do not rule that you have an unlimited claim to be brought whenever you decide that the phobia is developed.

MR. YANNACONE: He has to bring it then. He's got to decide and you must let me tell you the asbestos problems so you understand where we come from in this.

If you represent -

SPECIAL MASTER: Counsel, if you spent as much time reviewing asbestos philosophy and legal issues as I

have, you would preface your remarks by suggesting that maybe there is something that I don't know about it. I have spent as much time as you trying to figure out where those cases are going and what society can do.

[1530] But tell me -

MR. YANNACONE: May I present -

SPECIAL MASTER: What you are trying to do is avoid the statute of limitations by at risk.

MR. YANNACONE: No, Judge. I have this problem and it's a real problem. In all your review of the asbestos case, I will wager you are not aware of the workers' comp problem. A man walked into my office because I'm a specialist in workers' comp, and says I handled asbestos eight weeks ago. I got a lung full. They just took some samples of my sputum and they found ferruginous particles. I have been exposed and my doctor just told me if I am never exposed to asbestos again in my entire life, I have a -- and I don't smoke, I have a probability that is finite of 24 years to 30 years from now developing mesothelioma and dying miserably of lung cancer.

SPECIAL MASTER: That's a very fine doctor.

MR. YANNACONE: That particular set of facts exists and the Liberty Mutual Insurance Company is involved in it, as are a lot of other carriers. That state of facts exists today. Those people are within, even the draconian statute of limitations of **[1531]** the State of New York and can now commence an action. They have no clinically manifest damage.

SPECIAL MASTER: The Court permits the case to stand forever?

MR. YANNACONE: Nobody has brought the action yet because the New York law has just been firmed up in this area a year ago.

But this is a problem that's discussed every single day.

SPECIAL MASTER: Why do you think -- this is going to sound awful when somebody reads it. But why do you think, Mr. Yannacone, that you have to carry upon your shoulders the burden of every problem arising out of the Vietnam war?

MR. YANNACONE: Judge, I've left out all the political problems.

SPECIAL MASTER: I know that.

MR. YANNACONE: All the social problems and all the economic problems.

I am only interested in a problem of young men who will not manifest damage until some time in the future. The case -

SPECIAL MASTER: Why don't you let society take care of that? I mean, we have -

[1532] MR. YANNACONE: Why should you and I as the taxpayers who are society, with a capital S, if we win the case, on established liability, pay the cost of taking care of somebody whose cancer arises as has happened? We have a number of veterans who had not manifest symptoms seven months ago, except chloracne, and I got a call from a widow seven weeks ago and my husband who wrote you and said he had a rash seven months ago just died of soft tissue sarcoma, which we believe is a causally related cancer.

SPECIAL MASTER: I don't want to make it sound worse than it is going to read. But there is a manageable -- manability issue that you are treating, with all due regard, Mr. Yannacone, too lightly. You cannot -- I mean, you think the Court is going to approach this case on -- like a chinese menu?

MR. YANNACONE: No, it's not.

SPECIAL MASTER: That it's -- that it could take categories A, B, C, D, and E and if it doesn't like E, it will settle for A, B, C, and D?

MR. YANNACONE: Judge --

SPECIAL MASTER: The law -- the courts do not work that way.

[1533] MR. YANNACONE: If we establish liability, the --

SPECIAL MASTER: You cannot go forward unless you establish a class.

MR. YANNACONE: The class is so easy to define. The class is everyone who was exposed and who manifests physiological injury.

The only thing the Court has to do --

SPECIAL MASTER: What do you mean by "physiological injury"?

MR. YANNACONE: Physiological injury is regularly defined as that which is manifest upon certain kinds of chemical, physical and biological tests.

MR. RIVKIN: He's giving up his at risk claims?

MR. YANNACONE: No, I am not.

I can show you hundreds of claimants who have physiological injury but no clinical damage yet. You know the kind of claimants I am talking about and I know the kind of claimants we are talking about.

Your Honor, what I am saying to you --

SPECIAL MASTER: What you are saying to me, you know what you are saying to me?

[1534] MR. YANNACONE. It's a big case.

SPECIAL MASTER: No, no. It's a big case whether or not it's in it.

But what you are saying to me is you're giving me an interpretation that in effect can lead to a use of the statute of limitations in many jurisdictions to bar your claimants.

MR. YANNACONE: What do you think the defendants have argued?

SPECIAL MASTER: No, no. Wait a second.

Your interpretation can bar them. Their interpretation would, in my judgment, not bar them because what they are saying is at risk is not an identifiable medical area. So, therefore, in those states where discovery is the rule, the at risk defendant is not barred by the limitation.

But what you are saying is that if we accept your physiological approach, which is an interesting one, I will have to read it now, but what you are saying is that the at risk physiological approach will put a bar in those jurisdictions.

MR. YANNACONE: Judge, I didn't invent that. The carriers represented by these counsel invented it in the asbestos case.

[1535] SPECIAL MASTER: Wait a second. Wait a second.

They do not invent things. They argue from their position.

(continued on next page.)

[1536] MR. YANNACONE: No, they don't. They go out and hire an expert witness who comes up with the right theory.

SPECIAL MASTER: Mr. Yannacone, maybe I spent too many years in practice and on the bench, but merely because you are a plaintiff or merely because you are a defendant does not mean you are wearing the white hat.

MR. YANNACONE: No.

SPECIAL MASTER: There is a lot more to it than that.

The argument that somebody develops a theory -- I mean, with all due regard to asbestos defense lawyers, while they are doing a marvelous job, there is still a lot of money being paid, so they aren't developing your -- as your concept is, theories that are denying everybody everything.

MR. YANNACONE: In New York they are and in sixteen other states that will follow the New York statute of limitations.

SPECIAL MASTER: I think we have had too much philosophical analysis and if I could -- if I could strike the record, I would do it right now.

MR. YANNACONE: Your Honor, could I give you

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[1539] MR. RIVKIN: Sir, could I offer what I think might resolve this? I don't think the plaintiffs will oppose it.

Instead of everybody going down to Washington --

SPECIAL MASTER: Everybody does not have to.

MR. RIVKIN: We have the Government coming here next Thursday on CBS because they said they are going to appear. Can't they appear at that time and give us their position on whether they are going to cooperate on that, if that is what you are interested in finding out?

SPECIAL MASTER: I do not know. Let me decide whether it will be here or Washington. Let me get to this position of at risk because, frankly, I take it, the defendants' position is that, a, that there should be no class, but, b, if there is a class, it should not contain at risk claimants.

Do I put it in a simplified fashion? I am not asking for a definitive position. I think that's a general feeling I get.

MR. PAKULA: The position is -- our position is that the at risk claimants don't have a cause of action so they can't be in anything.

(continued on next page.)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

PLAINTIFFS' SECOND SUPPLEMENTAL MEMORANDUM ON CLASS DEFINITION AND SUPPLEMENTAL MEMORANDUM ON GENERIC CAUSATION

/s/ Irving Like
Irving Like,
Chairman, Law Committee

/s/ Thomas W. Henderson
Thomas W. Henderson,
Chairman, Generic Causation Committee

Albert J. Fiorella,
Chairman, Management Committee

Dated: September 12, 1983

[2] Definition of Plaintiffs' Class

This part of the Memorandum is intended to define the plaintiffs' class in a very broad manner so that the outcome of this litigation will be dispositive as to all present and potential claimants. At this time, plaintiffs submit that the class include those whose injuries fall within particular Agent Orange profiles, which are believed to be associated with their exposure to dioxin contaminated phenoxy herbicides (including Agent Orange), supplied by the defendants to the military while serving in South East Asia during the Vietnam

War. (As to the word "associated", please see Generic Causation portion of this Memorandum.) Those profiles will include the entire spectrum of adverse health effects, a partial list of which is set forth in the Interrogatories propounded to defendants on September 9, 1983, specifically #48, and is attached hereto as Exhibit "A".

In defining the class broadly, flexibility is retained by the Court to redefine the class, based at least in part on those adverse health effects that may be established in the generic causation trial, that is, those associated with exposure to dioxin contaminated phenoxy herbicides.

In its Pretrial Order No. 26 dated December 29, 1980, the Court broadly defined the members of the class:

> "Here, the plaintiff class can be readily identified; they are persons who claim injury from exposure to Agent Orange and their spouses, children and parents who claim direct or derivative injury therefrom. The Court has intentionally defined the class in broad terms consistent with the demands of this litigation. If we begin with the broadest possible class, the issues common to all members of that class can be resolved. It may later prove advantageous to create subclasses for various purposes, e.g., for resolving statute of limitations claims, **[3]** for determining liability in 'negligence' as opposed to 'product liability' states, and finally, perhaps, for preserving the class action format prior to remand to the transferor judges so as to provide them with the greatest possible flexibility in ultimately determining the issues remaining after multi-district treatment has ended."
>
> (P. 5)

Plaintiffs propose that this definition should be expanded to also include Australian and New Zealander servicemen and civilians such as employees of government contractor and non-military relief organizations such as the American

Red Cross, who were also injured as the result of exposure to defendants' contaminated herbicides in South East Asia.

In the language just quoted, the Court has listed several obvious benefits deriving from the flexibility of a broad class definition. For at least three reasons, plaintiffs agree that flexibility is a proper goal and believe that, with the definition now submitted, such flexibility is retained.

Other advantages are present. For example, the obvious one is that a broad definition avoids under-inclusion of injured claimants. Specifically, such definition permits the proper inclusion in the class of those whose injuries and diseases, i.e. adverse effects, are found to be associated with dioxin exposure in the trial on generic causation. In a pragmatic sense, it will be infinitely easier to redefine the class from the broad to the narrow, rather than the converse. Finally, notice to a broadly defined class is preferable if the Court should later determine that (b) (1) (B) treatment is appropriate based upon whether the defendants' "limited asset fund" can be established.

* * * *

[5] Therefore, such a broadly defined class is preferable not only within the context of (b) (3) class treatment, but to facilitate the use of a (b)(1) class in combination with or as an alternative to a (b)(3) class.

Plaintiffs therefore believe that the Court's definition of the class as set forth in its Pretrial Order of December 29, 1980 is proper and urge that the plan of class identification and notice combining direct *Eisen* type notice and constructive notice utilizing the media offers the most reasonable and practical means of implementing class notification.

Generic Causation

The issue of generic causation in the form of dioxin-associated injury and disease and how it is to be handled in the context of the trial is obviously a crucial one. In this light, the following is submitted.

As noted in Plaintiffs' Memorandum dated June 6, 1983, in order to preserve and foster further the aspect of commonality, generic causation perforce must be defined broadly. The question which should be presented to the jury is simply:

Could dioxin have caused the plaintiffs' injuries?

or

Is dioxin *capable* of causing plaintiffs' injuries?

The question, in either form however, has two components.

The first such component is exposure of the veterans to dioxin - whether by inhalation, ingestion, or external absorption. It is essential to note at this point that *any* level of dioxin contamination of *any* phenoxy herbicide manufactured and sold by *any* defendants can cause one or more of the injuries or diseases from which the veterans suffer. Contrary to *any* **[6]** assertion which has been made or might be made by *any* defendant in this regard, the basic scientific fact is there is no safe level of dioxin. Indeed, no safe level has or can be established at this time for any substance which can cause carcinogenic and/or genetic effects and/or other chronic manifestations. The scientific evidence in respect of all this to be presented on behalf of the plaintiffs will be quite clear.

The second such component is the effect of the provable exposure to dioxin by the veterans. More precisely, the entire spectrum of harmful effects (Exhibit "A") will require substantial medical evidence.

The evidence establishing exposure and adverse effects, coupled with such positive associations resulting from toxicological and/or epidemiological studies, demonstrates therefore the quintessential character of "Generic Causation" association in the specific area of dioxin-related injury.

After much study of dioxin and its multitude of adverse health effects, it has been clearly established that dioxin-related injury is a cumulative process, i.e. the higher the level and/or the longer a veteran was exposed, the earlier and/or

greater the chances of the manifestation of adverse health effects. However, as noted above, any level of dioxin is potentially harmful; higher levels result in a higher probability of harm. That is to say, since dioxin contamination to which a veteran was exposed may be harmful to human health, *all* of the phenoxy herbicides manufactured and sold by *any* of the defendants are responsible in some undefined part. This, therefore, triggers the concept of joint and several liability of *all* of the defendants who manufactured -- and sold phenoxy herbicides, including Agent Orange, to the United States for use in Vietnam during the period 1962-1971.

* * * *

[56] 48. State whether you knew health hazards, physical disorders, injuries, irritations or diseases were associated with exposure to, or use of, phenoxy herbicides, including but limited to the industrial synthesis (during and after) of 2, 4, 5-T. If your answer is affirmative, state or identify:

(a) the date you acquired such knowledge;

(b) the manner in which you gained such knowledge; (c) the type of health hazards, physical disorders,

injuries, irritations or diseases, including but not limited to:

chloracne; porphyria cutanea tarda; hyperpigmentation; hyper-keratosis; hirsutism; asthenia; weakness in lower extremities; loss of strength; easy fatigability; fatigue; headaches; peripheral neuropathy; polyneuropathy; intolerance to cold; other neurological deficits; irritation to eyes; impairment of sight; impairment of hearing; impairment of smell; impairment of taste; loss of weight; loss of appetite; anorexia; loss of sexual drive; sleep disturbances; orthostatic hypotension; abdominal pain; nausea; vomiting; diarrhea; other gastrointestinal disorders; neurasthenia; depression; violent behavior; other psychobehavioral disorders; myocardial infarction; atherosclerosis; other

cardiovascular disorders; liver damage; pancreatic dysfunction; kidney disorders; urinary tract disorders; pulmonary pathologies; other respiratory disorders; fat metabolism disorders; carbohydrate metabolism disorders; cholangiocarcinoma; other liver cancers; kidney cancer; bladder cancer; pancreatic cancer; colon cancer; stomach cancer; other gastrointestinal cancers; lung cancer; fibrosarcoma; leiomyosarcoma; liposarcoma; rhabomyosarcoma; myofibrosarcoma; neurofibrosarcoma; fibrous histiocytoma; retroperitoneal neurogenic sarcoma; fibrosarcomatous mesothelioma; other soft-tissue sarcomas; leukemia; angiosarcoma; other blood cancers; hepatoma; lymphoma; squamous cell carcinoma of skin; other skin cancers; thyroid cancer; other glandular cancers; cancer of tongue; cancer of hard palate; other cancers of mouth; and

(d) all documents and communications which refer, reflect, relate to, or embody the information sought by this interrogatory.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

United States Courthouse
Brooklyn, New York

December 12, 1983
1:00 p.m.

Before:
HONORABLE JACK B. WEINSTEIN, Chief U.S.D.J.

[Transcript Excerpts]

* * * *

[20] supplement. That is true of all these interrogatories where you have no complete information.

Interrogatory 8, the same ruling; the Master's ruling is confirmed.

Interrogatory #9, no objection.

Interrogatory 10 --

MR. DEAN: As to #10, we were fighting to get the information. We don't have it yet.

THE COURT: I can tell you what you're going to face.

I will not expand discovery beyond what the Master has permitted. As you see from the proposed class action definition, I am going to let you prove anything that you want. I am going to open this case wide open, because I don't want to retry it.

Based on the little I know, if you start expanding this case beyond dioxin, it's a suicidal matter; because no jury is

going to understand it, and you're going to lose everything. If that's what you want to do, it's okay with me.

The one thing I don't want is to finish this case -- assuming it can be finished -- and then have somebody else step in with another class action on some different herbicide or some slightly different theory.

If and when we close this case, I want it completely closed on everything. So, whatever the Master ruled **[21]** on the discovery -- we'll hear discussion on -- but it's a discovery motion; not a motion to prevent you from trying it, if that is what you want to do.

MR. DEAN: The motion to which this question -- this interrogatory may refer is a pending motion which has been pending for some months; the subject matter of which -- for example-- our right to Dow Workmen's Compensation records -- and a number of briefs have been submitted on both sides --

THE SPECIAL MASTER: It's only up in the air because counsel tell me they resolved the problem.

If they want a ruling, I'll be happy to give it within 48 hours.

MR. DEAN: The problem is not resolved, nor have I made the representation it is --

THE COURT: You want Workmen's Compensation records on what?

MR. DEAN: All exposure claims filed by Dow. Diamond Shamrock has given us the records with the names. Monsanto has given us their records, period.

Dow refuses to release the records, claiming --

THE COURT: What period --

MR. DEAN: -- Michigan law prevents them from doing it. We do intend to use, as noticed, certain prior industrial claims. We don't have all of them.

[56] close up loose ends like this.

I think the Clerk's entry of a judgment is sufficient here.

Is there anything else on page three?

Page four?

MR. GORDON: On page four, your Honor, there is a deletion, which I am sure is deliberate, which I would like to discuss, that was paragraph four of defendant's proposed notice, which was the provision for identifying representative plaintiffs and also stating the nature of their claims, and that there had been no determination as to the adequacy or typicality.

We are quite concerned that the Court can issue a classification order, and authorize the notice where as yet, there has been no determination as to adequacy or typicality, and in fact, as of today, we have not obtained a list of the full represented plaintiffs in the class.

I don't think the Court can do that. If the Court is going to insist on certifying a notice before that is done, I think that there --

SPECIAL MASTER: Excuse me, your Honor?

MR. GORDON: It's an important provision which is not incorporated.

SPECIAL MASTER: Your Honor, it is assumed that this order will not go out until (b) (3) is filed with the Court.

[57] THE COURT: Until what?

SPECIAL MASTER: Until your opinion finding (b)(3) your Honor.

THE COURT: The position of the defendants is that I have not really had the information necessary to make that determination.

Isn't that it?

MR. GORDON: That's absolutely correct, and let me give you an example, your Honor.

In the first five names we have received from the plaintiff, I believe there were three cancer cases. I am not familiar with the other two claims.

But at various times, plaintiffs have claimed a wide range of injuries, such as porphyria, cutanea and tarda, various other liver illnesses, heart problems, impotence, a whole plethora of ailments.

And if there are no representative plaintiffs with that particular ailment, they cannot represent a class member who had that ailment, who believes it was caused by Agent Orange.

This is an important problem, and I believe we should ascertain a full profile of each of the representative claimants, and find out if there are complaints outstanding, or which indicates there is an area not being represented.

[58] And I think that should be disclosed to the class notice.

MR. DEAN: Your Honor, adequacy and typicality has been decided in September of 1980, as well as by your Honor. Those are precedents before class certification under (b) (3) or (b) (1) (a) or (b) (1) (b).

Those four elements, of which adequacy and typicality are included, must be resolved in favor of the petitioning parties, before your Honor makes a determination with regard to the type of class that it is.

So we say when Mr. -- when the lawyer from Diamond Shamrock indicates that adequacy and typicality must be the test for the representative claimant, I am not persuaded it is right, and I don't believe that is the law.

MR. GORDON: I would further point back to Judge Pratt's original decision, where he indicated his intention to certify the (b) (3) class. He indicated at some point in the future, a formal complaint would be served which listed the representatives of the plaintiffs.

And I might add, at this point, there is no class complaint as that term is usually understood in this litigation.

There is no action which we are proceeding in right

* * * *

[61] defects are not caused. And if they come in with a fetal defect representative plaintiff, and there's a finding against that, there has to be some inquiries and a lot interrogatories, I believe, and then there will be no fetal defect cases in the class.

I take it that the typical claims they have selected include the relatively modest claims, ranging to the very severe.

MR. PAKULA: That's not correct, your Honor.

MR. DEAN: There are no relatively modest claims, but there are claims of basic chloracne, and from that, claims involving cancer deaths and children with birth defects.

MR. KROHLEY: I received a list of 11 so-called representative plaintiffs a few minutes ago, and from my quick count, five have cancers.

By this, I don't think the plaintiffs wish to say that fifty percent or so of the entire class suffers from some form of cancer.

THE COURT: If they don't put in a claim, let's assume the claim is for tingling fingers --

MR. KROHLEY: There are tingling claims in here, your Honor.

THE COURT: Then tingling claims are out.

MR. KROHLEY: I agree with what your Honor said.

[62] But I think the more fundamental point here is that we are misleading the trier of fact. I think we are misleading a jury.

If the jury thinks that these ten people or eleven people have representative illnesses, and they get the impression that

fifty percent have some form of cancer, I think there is a gross misrepresentation of the plaintiffs' class.

THE COURT: I will explain that, and I am sure you will.

Alan, make a note of this.

I want to give the jury a preliminary charge. I will put that in the preliminary charge, and you can make the point to them. I don't see how we can avoid that problem.

MR. KROHLEY: I think the problem has been created where we are calling representatives people as to whom no determination has been made, as to whether they are representatives.

That's not in terms of what they have, but in terms of their exposures, or length of exposures, and whatever possibilities in the world there are, for causing these illnesses.

THE COURT: I will look through what they have in the trial.

* * * *

[65] a class.

Are they representative or just 11 people --

THE COURT: You will go through it and I will hear you further on. It may well be that they do not have a class. I do not know what they have.

MR. GORDON: It's fine to use a charge to indicate to the jury that the ten claims in front of them are not representative of the entire class --

THE COURT: I am not --

MR. GORDON: Shouldn't something be done before a class notification goes out to 120,000 people on the Agent Orange registry, before you broadcast the case to the 50 states, Australia and New Zealand, when half will not be part of the class at all?

MR. DEAN: How is that, that half may not be part of the class? We have anguished over the selection of the names. We are aware it is a two-edged sword. We are very aware of that. When the defendants say, "We'd like to select your plaintiffs," we have a little difficulty respectfully.

THE COURT: We have a problem here. I understand that both sides have a problem. The Court has a problem. We have an enormous case where we have to come to grips with it. This is the way I have decided that we should do it and this is the way we are going to do it.

[66] As we proceed, if there are special problems with particular plaintiffs you will bring them to my attention. That is one of the reasons I was anxious to get the names and the information to you as quickly as we can. We'll be meeting regularly and I will be happy to hear you on any problem and further limitation on the class --

MR. KROHLEY: The thing -- the practical problem that we have here -- and I know it is something that your Honor will not consider. We do not have the time between now and May to do what I am suggesting.

However, what I am suggesting is that I think it is not even a close case. There is no way that this case should proceed as a class action untii the determinations have been made that there are representative plaintiffs. It is the reason why mass tort litigation proceeds as a class --

THE COURT: I do not know the profile of these people yet. Maybe you do, but I do not. When you get something on them, we will sit down and go through them and see how they fit in.

MR. KROHLEY: I will make an effort to do that in the next week. May I ask the Court to hold off on certifying this class for one week?

THE COURT: I have to move ahead on this. This certification has been kicking over for too long.

[67] MR. GORDON: May I raise another problem concerning the advocacy of representatives. In the event we send out the notice and move along, a month or two months from now, and it turns out that the representative plaintiffs are not representative of very many people, we will proceed to trial and the class will be changed. It will concern only cancer cases or whatever. The class will be decertified as to other claimants. The people have already received the notice will not know what has happened. They will continue to rely on the class action that does not include them anymore, while the statute of limitation will begin to toll -- toll and will expire. There is a very serious danger to prejudice those who are later cut of the class, because we have not made this determination --

THE COURT: That is the nature of life. We proceed as best we can with the information available and then we modify our decision. We try to take care of these problems. We are trying to get the names and addresses of these people, to give them to the extent that we can. We will do the best we can, but in the meantime, life is moving on. The veterans are dying, not necessarily because of Agent Orange. I am not saying that that is the reason. We cannot wait indefinitely.

* * * *

[71] that it does any good, really.

If it comes to the Clerk, the Clerk will have to forward them. There is no problem.

Page 8, no more problems.

Page 9, any problems?

Page 10, any problems?

The exclusion request form. I have added that information on the bottom, which seems to me will be helpful in fixing who these people are, but I do not know whether the form of it --

MR. DEAN: We have no objection to it.

MR. GORDON: Could I raise at this point a problem which has been briefed several times and still continues to trouble me, and that is the class definition in terms of claiming injury.

The problem there is no objective standard to determine whether or not anyone that received the notice in effect claiming an injury and the concern that I have if defendants are successful at trial, and then claims begin pouring in that are in the class, who are sick at the time of the trial, but they say, "I wasn't claiming injury at that time relating to Agent Orange exposure" --

THE COURT: I am not sure that I understand. Say that again? I did not follow you.

[72] MR. GORDON: If defendants are successful at trial, representative of plaintiff claims are dismissed, following that there are additional claims made by class members who received a notice, did not opt out, but when a challenge is made by defendants --

THE COURT: I see.

MR. GORDON: -- they say, "I was no" --

THE COURT: How would you suggest that we reframe it?

MR. GORDON: It's difficult, because it was one of the main reasons that the defendants opposed classification, and may be focusing your attention on it now, that we might come up with a solution to this problem. Claiming injury is not an objective standard.

THE COURT: We can say, "You are injured as a result of" --

MR. GORDON: I do not think we can say that.

MR. KROHLEY: So do I.

MR. GORDON: It's the defendant's position that no one was injured by Agent Orange.

MR. DEAN: Of course.

THE COURT: That is why we put it in. If you want that protection, it would say "Who are injured" --

MR. GORDON: I believe in the original proposal, a group that believes they may be related --

* * * *

[73] THE COURT: That does not solve your problem. At the time they don't believe it. Later on they believe it. If you want it protected, it should be who are injured.

MR. GORDON: I do not want that. I will think about it in the next day or so, and perhaps the Court will also.

THE COURT: I will give it some thought, but you had better get to me quickly, because I plan to issue something, if I can get a typist. I use words, "Armed Forces Identification Number."

My number used to be a serial number. Is that what it is for all the Armed Forces?

THE SPECIAL MASTER: Yes.

MR. MATTHEWS: If I may, they had a serial number that was in effect until somewhere around 1968. Then your Social Security number became your serial number.

THE COURT: I had better write "identifying number."

MR. MATTHEWS: I think so.

THE-COURT: I was not sure what they did.

MR. PAKULA: One addendum, to make sure that the record is clear, and to Subparagraph H of the order itself, Page 7, I just would like the record to be clear that the defendant's position on that was that the plaintiff should at their expense have to obtain

* * * *

[75] THE COURT: As I explained to you, my position on that is: That I do not want -- should this action ever be terminated -- some other plaintiff's attorneys to come in with a new class of these injured by herbicides, other than Agent

Orange, and if I limit the class as you suggest that is just what is going to happen. On the hypothetical that this case is settled, X millions of dollars, the day after it is settled there will be 38 attorneys -- at least -- throughout the country who will jump in with a new class action covering those injured by herbicides, not Agent Orange and they will therefore be able to boost the settlement X plus A. I do not want that, if I can avoid it. That is the reason I did it.

MS. MINTZER: I understand that, your Honor. The problem for the defendants are that we have been discovering and preparing our defense with regard to 2,4,5-T, 2378-TCDD --

THE COURT: And that is what you will face at the trial, because if the plaintiffs get involved in all these other things, they are going to succeed only in getting nothing. They have to really try this case on the theory that they suggested, that dioxin is terribly poison. If they get involved in all kinds of trivial discomforts, tingling at their fingerends,

* * * *

[111] Agent Orange.

MR. GOLDSTEIN: I think what I just laid out would be an argument that focuses on 2,4-D, albeit, as a part of Agent Orange --

THE COURT: I cannot be more specific at this stage. We all understand that if the plaintiff attempted to comment at the trial on 2,4-D and shift their grounds from what it has been, as I understand it up to now -- first of all, no Brooklyn jury is going to go along with them. We have very tough jurors. If the Brooklyn jury does go along, I will not go along. We have a practical matter. They are committed to Agent Orange practically. How they want to deal with the problem, I do not know. Apparently, they are getting some information from some expert that makes them nervous. I can't look into their minds and I have no desire to do so, even if I had the ability.

MR. GORDON: Your Honor, a couple of points --

THE COURT: The order is going out as is.

MR. GORDON: -- with respect to the class --

THE COURT: The class action order is going out as is.

MR. GORDON: That is one of my points. I think the definition of the herbicides in question needs to be adjusted in view of --

[112] THE COURT: I am not going to adjust it. I told you the reason why. I am not going to adjust it, because I do not want this case terminated and then 24 hours later somebody walks in with a complaint that takes care of a class that is not covered by this class action. I want the class action definition subject to subsequent discussions -- as broad as possible, so that we try one Vietnam case and that is it -- and we can try it. That is why I am doing it. If you want to submit any brief on the point, I will be glad to hear it. At this point I do not think argument will help us very much.

MR. GORDON: I want to make sure that you are clear on that.

We have not gotten to the radio and television announcements --

THE COURT: I will be happy to hear you.

MR. GORDON: First, the defendants have suggested that the announcements -- in addition to mentioning Agent Orange -- mention 2, 4, 5-T and dioxin. The reason we did that was because --

THE COURT: How do you want it?

That was put in at your request. What do you want to do with it?

MR. GORDON: Exhibit B --

STIPULATION OF SETTLEMENT IN IN RE "AGENT ORANGE" PRODUCT LITIGATION, M.D.L. 381

It is hereby stipulated and agreed that:

1. Defendants as a group will pay $180 million, plus interest, to the class in a manner ordered by the court. Interest is to accrue at the prime rate from May 7, 1984.

2. Defendants will advance out of this fund expenses on account of notice and settlement administration (but not to include attorneys' fees or attorneys' expenses).

3. No other distribution will be made from the settlement fund until after an order approving settlement has become final, including appeals.

4. The settlement fund will indemnify defendants for any final judgment, excluding defendants' costs and fees rendered against them in "Agent Orange" suits by service persons in state court. The indemnification shall be for final judgments rendered against any or all defendants up to an aggregate of $10 million on all such final judgments. The court may allow additional payments after January 1, 1990 if the payments to members of the class are assured.

5. The class definition as interpreted will specifically include these service persons who have not yet manifested injury.

6. If plaintiffs pursue claims against the United States within one year, they may retain documents until after any case or cases have been concluded.

7. Plaintiffs and defendants reserve all rights and claims against the United States and any persons not be a party to this class action.

8. Defendants deny any liability.

9. Defendants reserve the right to reject this settlement if they feel that the number of opt-outs is substantial. This right must be exercised no later than 10 days before the public hearing on Rule 23(e).

10. Any class member who has opted out shall have the opportunity to opt back in within a reasonable time as determined by the court.

11. Any party may apply for disposition of the renaining funds on order of the court after twenty-five years.

12. This agreement is subject to Rule 23(e) of the Federal Rules of Civil Procedure.

13. Arrangements will be made from the fund to assist afterborns.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re	:	MDL No. 381
"AGENT ORANGE"	:	
Product Liability Litigation	:	
MICHAEL F. RYAN, et al.,	:	
Plaintiffs,	:	
-- against --	:	79 C 747
DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL, INC., and THOMPSON CHEMICALS CORPORATION,	:	SETTLEMENT AGREEMENT
Defendants.	:	

The parties to the above-entitled action, by and through their attorneys, propose the following Settlement Agreement (the "Agreement") for the Court's approval.

WHEREAS, the above-entitled action has been brought by the plaintiffs as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of themselves and all other persons similarly situated: and

WHEREAS, the Court. has, by order dated December 16, 1983, certified this action as a class action, and defined a class (the "Class"), under Rules 23 (b) (3) and 23 (b) (1) (B) of the Federal Rules of Civil Procedure; and

WHEREAS, the attorneys for the Class represent that notice to the members of the Class has been provided substantially as required by that order; and

WHEREAS, the Seventh Amended Complaint and all predecessor complaints (the "Complaint") assert certain claims against the defendants for injuries allegedly resulting from exposure to phenoxy herbicides composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid, to wit, Agent Orange, Agent Orange II, Agent Purple, Agent Pink and Agent Green (hereinafter collectively referred to as "Agent Orange"), which were manufactured for or sold to the United States by various defendants for use in Vietnam; and

WHEREAS, all of the defendants have been served or have appeared and have filed answers or are deemed to have answered and denied all of the material allegations of the Complaint, and have asserted affirmative defenses that the claims are without merit and are barred in whole or in part; and

WHEREAS, the attorneys for the Class have conducted a thorough study and investigation of the facts and the law relating to the matters set forth in the Complaint, and have conducted extensive pretrial discovery proceedings, including oral depositions of numerous of the defendants' present and former employees and of present and former government employees, and have examined and analyzed voluminous documentation relating to the subject matter of the Complaint; and

WHEREAS, the defendants deny and disclaim any liability or wrongdoing whatsoever and believe that this action is without merit; and

WHEREAS, the attorneys for the Class have agreed to settle the claims alleged in this action pursuant to the terms

and provisions of this Agreement after taking into account the substantial benefits that the members of the Class will receive as a result of the settlement, the expense, burdens, and diversion of protracted litigation, including lengthy appeals, the risk of not prevailing at trial, and the conclusion reached by the attorneys for the Class that the settlement is fair, reasonable and adequate and in the best interests of the Class; and

WHEREAS, the defendants desire to avoid the expense, burdens and diversion of protracted litigation, including lengthy appeals, the risk of not prevailing at trial, and desire to put at rest all controversy between the plaintiff Class and defendants, and their foreign and domestic predecessors, successors, parents, subsidiaries, affiliates and insurers, as well as any of their stockholders, directors, officers, employees, and agents, and desire to settle, compromise and terminate this action, all claims asserted, and all other claims by any member of the Class hereafter arising against the defendants that are, or could in the future be, based on or arise out of any of the', matters alleged in the Complaint; and

WHEREAS, all parties to this Agreement desire and intend that the comprehensive settlement and compromise provided for herein shall extend to and include all claims alleged in the Complaint and all cross-claims alleged in this action (but excluding all claims against the United States) , and that this action shall be dismissed with prejudice and without costs to any party,

NOW, THEREZORE, IT IS HERESY AGREED, by and among the undersigned as of May 7, 1984, that this action shall be compromised and settled, subject to the approval of the Court, upon and subject to the following terms and conditions:

1. Subject to all of the conditions contained in this Agreement, defendants will pay or cause to be paid on their behalf one hundred eighty million dollars ($180,000,000.00) (the "Settlement Amount") in full and final settlement of all

claims for compensatory damages against them, and their foreign and domestic predecessors, successors, parents, subsidiaries, affiliates and insurers, as well as any of their stockholders, directors, officers, employees and agents, that arise out of or are based on, or could in the future arise out of or be based on, any of the matters alleged in the Complaint. The unpaid amount of the Settlement Amount shall bear simple interest at the Average Prime Rate (hereinafter defined) from May 7, 1984 through the date of payment. At the time any part of the Settlement$_s$ Amount is paid, accrued interest shall be payable on that part. "Average Prime Rate" shall mean the sum of the publicly announced prime commercial lending rates of The Bank of New York on the last business day of each month that payments hereunder have been outstanding, divided by the number of months that the payment(s) have been outstanding. All calculations shall be based on a 360-day year. Payment of the Settlement Amount with interest accrued thereon shall be made by defendants within 10 days after an order approving this Agreement has been signed by the Court; provided, however, that any defendant may, at its option, pay any or all of its share of the Settlement Amount with interest accrued thereon in advance of the foregoing date. All amounts paid by defendants shall be paid into a fund (the "Fund") to be established, maintained and administered by the Court. No distribution to Class members, or payment of attorneys' fees or out-of-pocket disbursements, is authorized until after an order approving this Agreement has become final and all appeals and requests for review have been decided.

2. The agreement by the defendants to pay the Settlement Amount with interest accrued thereon is not intended to and shall not be deemed to create a joint or joint and several obligation on the part of the defendants. Each defendant shall be obligated solely to pay that portion, with interest, of the Settlement Amount set forth in a sealed agreement delivered to the Honorable Jack B. Weinstein, Chief Judge, United States District Court for the Eastern

District of New York, on May 7, 1984. Failure of any defendant to fulfill its obligations as set forth in said agreement or to abide by any term or condition of this Agreement shall not abrogate this Agreement as to any other defendant or increase any obligation of any other defendant under this Agreement. Each defendant shall provide financial security for its payment in a form acceptable to the Court after consultation with the parties.

3. Defendants will advance sums in amounts to be set from time to time by the Court, in proportion to their contributions to the Settlement Amount, solely for the preparation and dissemination of notice of the settlement and for incidental administration expenses as approved by the Court. The Settlement Amount shall be reduced by the amount of advanced sums. If for any reason this Agreement is not approved or does not become effective, the unused portion of the advanced sums and all interest accrued thereon shall be returned to defendants forthwith in proportion to their contributions to the Settlement Amount, and all expenses paid from sums advanced by defendants shall be divided and assessed as determined by the Court.

4. The Fund shall be maintained and administered by the Court and shall be under the Court's continuous jurisdiction, control and supervision to assure that the Fund shall earn the maximum interest consistent with safety and that all disbursements are properly made. The Court may, with or without consulting the parties, appoint and remove, with or without cause, auditors, special masters, disbursing agents, consultants, counsel or others and enter into appropriate contracts or authorize its agents or special masters to do so. The expenses of persons appointed by the Court shall be payable out of the Fund in accordance with Court order. All expenses of administering the Fund, including the cost of preparing and disseminating notice of settlement to the Class and of validating and determining claims, shall be paid from the Fund. All interest and earnings of the Fund shall accumulate and become part of the Fund. After 25 years from

the date of this Agreement, any balance remaining in the Fund shall be disposed of in such manner as the Court may direct. Except as specifically set forth in this Agreement, 'defendants shall have no responsibility or obligation with respect to the Fund or distributions therefrom.

5. Defendants and their foreign and domestic predecessors, successors, parents, subsidiaries, affiliates and insurers, as well as any of their stockholders, directors, officers, employees and agents, are not, and in the future shall not be, subject to liability or expense of any kind to any member of the Class in respect of any claim arising out of the subject matter of the Complaint, except as to their obligations to make payments pursuant to this Agreement. Claims against the Fund shall be the exclusive remedy of all Class members against the defendants or any of their foreign and domestic predecessors, successors, parents, subsidiaries, affiliates and insurers, as well as any of their stockholders, directors, officers, employees and agents, and all members of the Class are forever barred from instituting or maintaining any action against any of the defendants, or any of their foreign and domestic predecessors, successors, parents, subsidiaries, affiliates or insurers, as well as any of their stockholders, directors, officers, employees and agents, arising out of or relating to, or in the future arising out of or relating to, the subject matter of the Complaint.

6. The Fund shall indemnify all defendants, and their foreign or domestic predecessors, successors, parents, subsidiaries, affiliates and insurers, as well as any of their stockholders, directors, officers, employees and agents, for all final compensatory judgments (excluding settlements), exclusive of costs and attorneys' fees, rendered against any of them in all state-court actions alleging harm caused by exposure to Agent Orange in or near Vietnam, not to exceed an aggregate amount of $10 million. The Court may, however, allow additional payments of indemnification after January 1, 1990, if, in the Court's discretion, payments to members of the Class are assured.

7. In the distribution of the Fund arrangements will be made to assist children born on or after January l, 1984. Such afterborn children by whom or on whose behalf an election is made to receive benefits from the Fund shall be subject to the terms and conditions of paragraph 5 hereof as if members of the Class.

8. The Class specifically includes persons who have not yet manifested injury. All persons who are otherwise qualified but who previously requested exclusion from the Class shall have the opportunity to withdraw their exclusion within a reasonable time as determined by the Court, and shall thereby be included in the Class.

9. Any defendant shall have the right to withdraw from this Agreement if it believes in its discretion that the number of persons who have elected to be excluded from the Class is substantial. Any defendant may exercise that right no later than 20 days before-the date for the first public hearing scheduled in accordance with Rule 23(e) of the Federal Rules of Civil Procedure to consider approval of the settlement of this action. If any defendant withdraws from this Agreement pursuant to this paragraph, the Agreement shall remain in full force and effect as to the plaintiff Class and as to the remaining defendants in accordance with their proportionate shares of the Settlement Amount.

10. Neither this Agreement nor any proceeding taken hereunder shall be construed as or deemed to be evidence or an admission or concession by any defendant of any liability or wrongdoing whatsoever, which is expressly denied by each defendant, or on the part of the plaintiffs of any lack of merit in their claims. None of the provisions of this Agreement, nor evidence of any negotiations or proceedings in pursuance of the compromise and settlement herein, shall be offered or received in evidence in this action or any other action or proceeding as an admission or concession of liability or wrongdoing of any nature on the part of any of the defendants, or for any other purpose whatsoever (including,

without limitation, to establish jurisdiction, venue or waiver of any affirmative defense), except to enforce the terms and provisions hereof.

11. The plaintiffs and defendants expressly reserve all rights and claims which they now have, or may at any time be entitled to assert against the United States, including its offices, departments, agencies, representatives, agents and employees. Plaintiffs further reserve all such rights and claims against every person (a) not a party to this action, and (b) not a foreign or domestic predecessor, successor, parent, subsidiary, affiliate, insurer, stockholder, director, officer, employee or agent of a defendant. Each defendant further reserves all such rights and claims against every person (a) not presently a party to this action, and (b) not a foreign or domestic predecessor, successor, parent, subsidiary, affiliate, insurer, stockholder, director, officer, employee or agent of another present defendant.

12. The attorneys for the Class shall return to each defendant, respectively, all documents in their possession or control produced by that defendant, including microfilm and all copies, within 30 days after final judgment is entered in this action and is no longer subject to appeal or review, or if plaintiffs pursue claims against the United States within one year after the date of this Agreement, within 30 days after final adjudication of those claims, whichever is later.

13. The settlement of this action shall become effective only when the judgment contemplated by this Agreement dismissing with prejudice and without costs both plaintiffs' claims, including claims for punitive damages, and defendants' cross-claims becomes final and is no longer subject to appeal or review.

14. Any award of plaintiffs' attorneys' fees and necessary out-of-pocket disbursements incurred by them in the prosecution and settlement of this action shall be payable exclusively from the Fund, and defendants shall not be liable for any such payment.

15. All of the undersigned attorneys severally represent that they have been duly authorized to enter into this Agreement.

16. This Agreement will be null and void unless the Court expressly approves it pursuant to Rule 23(e) of the Federal Rules of Civil Procedure as a fair, reasonable and adequate settlement of this action.

17. In the event this Agreement is not approved by the Court, or does *not* become effective for any reason, then this Agreement shall be null and-void for all purposes and of no further force and effect, subject to the provisions of paragraphs 3 and 10 hereof, and all sums remaining in the Fund shall be repaid to the defendants forthwith, together with all interest thereon, in accordance with their prior contributions to the Fund.

18. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

19. The Court shall retain jurisdiction over the Fund pending its final disposition.

Dated:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE"
Product Liability Litigation

MDL No. 381

MICHAEL F. RYAN, *et al.*,
Plaintiffs,
against

DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, T H AGRICULTURE & NUTRITION COMPANY, INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL, INC., and THOMSPON CHEMICALS CORPORATION,
Defendants.

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79 C 747

NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION AND CLAIM FORM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re	:	MDL No. 381
"AGENT ORANGE"	:	
Product Liability Litigation	:	

MICHAEL F. RYAN, *et al.*,

Plaintiffs,

-- against --

DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, T H AGRICULTURE & NUTRITION COMPANY, INC., INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL, INC., and THOMPSON CHEMICALS CORPORATION,

Defendants.

79 C 747

NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION

YOU ARE HEREBY NOTIFIED OF A PROPOSED SETTLEMENT OF THIS CLASS ACTION, OF HEARINGS TO BE HELD BY THE COURT TO DETERMINE WHETHER IT SHOULD BE APPROVED, AND OF WHAT YOU MUST DO NOW IF YOU BELIEVE YOU HAVE A CLAIM FOR ADVERSE HEALTH EFFECTS ALLEGEDLY RELATED TO AGENT ORANGE EXPOSURE IN OR NEAR VIETNAM.

1. The Class.

This Court has previously certified a plaintiff class consisting of those persons who were in the United States, New Zealand or Australian Armed Forces at any time from

1961 to 1972 who were injured while in or near Vietnam by exposure to "Agent Orange" or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin (collectively referred to as "Agent Orange"). The class also includes spouses, parents, and children born before January 1, 1984, directly or derivatively injured as a result of the exposure.

On or about March 9, 1984, notice was given to advise class members of the certification of a class under Rule 23(b)(3) and of their right to request exclusion from the class. All persons who did not request exclusion on or before May 1, 1984, as provided in that notice, are members of the class for the purposes of the proposed Settlement if they fall within the above class definition. Those persons who requested exclusion are being sent a separate notice, pursuant to which they may withdraw such requests and become eligible to participate in the proposed Settlement if it is approved by the Court.

2. The Litigation And The Proposed Settlement.

This litigation was brought on behalf of the above defined class against seven chemical company defendants, Dow Chemical Company, Monsanto Company, T H Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal, Inc., Hercules Incorporated and Thompson Chemicals Corporation. The plaintiff class representatives (as appointed by the Court) have sought recovery for various injuries claimed to have resulted from exposure to Agent Orange in or near Vietnam, including among others, various health-related effects upon servicepersons, birth defects to their children and miscarriages by their wives. Defendants denied and continued to deny any liability or wrongdoing.

The attorneys for the class representatives and the attorneys for all of the defendants have entered into a Settlement Agreement, made as of May 7, 1984, which is

subject to and conditioned upon the Court's approval of its terms. Under the Settlement, if it is approved, the defendants collectively will pay One Hundred Eighty Million Dollars ($180,000,000), plus interest at the average prime rate from May 7, 1984 to the date of payment, into a Settlement Fund ("the Fund") to be established and supervised by the Court for the payment of class members' claims.

A copy of the Settlement Agreement is attached hereto. Although a summary of its principal terms follows, you should examine the Agreement itself. Nothing in this Notice shall be construed to alter the terms of that Agreement.

If the Settlement is approved by the Court, the defendants' payments into the Fund will dispose of all claims against them asserted in this litigation or arising out of or based upon the matters alleged in this litigation. The defendants will also be entitled to an indemnity out of the Fund up to the total amount of $10 million for judgments that might be rendered against them in certain state-court cases also involving alleged Agent Orange injuries. The Court may allow additional payments of indemnification after January 1, 1990 if, in the Court's discretion, payments to the members of the class are assured.

All payments by the defendants will be made no later than ten days after an order approving the Settlement Agreement has been signed by the Court. The Settlement Agreement allows any defendant to withdraw from the Settlement up to 20 days prior to the Court's first hearing to consider approval of the Settlement in the event it determines that the number of persons who have elected to be excluded from the class is substantial.

The Settlement Agreement confirms that the class includes persons who have not yet manifested injury.

The Settlement Agreement also provides that persons who have previously requested exclusion from the class on or before May 1, 1984 may participate in the Settlement by withdrawing their exclusions.

The Settlement Agreement further provides that arrangements will be made to assist afterborn children from the Fund.

Both the plaintiffs and the defendants reserve all of their rights to make claims against the United States Government and any person or company that is not a defendant or a predecessor, successor, parent, subsidiary, affiliate or insurer of a defendant.

The plaintiff class representatives and their counsel have concluded, after taking into account the many sharply contested issues involved, the risks and costs attending further prosecution of this litigation, and the benefits to be received pursuant to the proposed Settlement, that settlement of this litigation upon the terms provided in the Settlement Agreement will be in the best interests of the class.

3. Hearings To Consider Approval Of The Settlement Agreement.

The Settlement Agreement will not become effective unless and until the Court decides that it should be approved as a fair, reasonable and adequate compromise of the aggregate claims of the plaintiff class as a whole. In order to assist the Court in making this decision, the Court will hold hearings ("the fairness hearings") in five cities in various parts of the United States during the month of August, 1984, at the times and places set forth at the end of this Notice. Following those hearings, the Court will determine whether the proposed Settlement, the principal terms of which are described above, should be approved. THE ONLY QUESTION TO BE DECIDED AT THIS TIME IS WHETHER THIS SETTLEMENT AS A WHOLE IS FAIR, REASONABLE AND ADEQUATE.

All written objections to the Settlement should be submitted to the Clerk in writing by July 30, 1984, at the address given at the end of this Notice. Class members or their representatives may appear at any of the hearings and any objections they have will be heard by the Court. Any person

who wishes to be heard should notify the Clerk on or before July 30, 1984, at the address given at the end of this Notice, stating the amount of time he or she requests.

If the Court approves the proposed Settlement, it will subsequently conduct further proceedings with respect to the question of allocation and distribution of the Settlement Fund to qualifying class members in satisfaction of their claims for injuries allegedly related to Agent Orange exposure in or near Vietnam.

The Court recognizes that the question of allocation and distribution of the Settlement Fund to class members involves complex issues that will require extensive further study, as well as input from Vietnam veterans, and therefore will not make any decision on this question at the present stage of the proceedings. The Court does, however, actively solicit and encourage and will consider recommendations and suggestions on this question from any party to the litigation, Vietnam veterans and other interested persons. Any such recommendations and suggestions may be submitted in writing at the address given at the end of this Notice, and will be subject to preliminary oral discussion at the hearings scheduled by this Notice.

The Court is deferring for future consideration the question of fees and expenses to be awarded to plaintiffs' counsel from the Fund. The Court has determined that Rule 5 of the U.S. District Court for the Southern and Eastern Districts of New York should not be applied in this litigation because of the need for continued intensive work by the attorneys until the close of the fairness hearings and because of the complexity of the fee applications. *Cf. In Re "Agent Orange" Product Liability Litigation*, MDL No. 381, P.T.O. 90, 100 F.R.D. 778, 780 (E.D.N.Y. 1984) (discretion under local Rules). All applications for such awards of attorneys' fees and expenses through the completion of the fairness hearings will be filed with the Clerk no later than August 31, 1984, and will be available for inspection in the Clerk's Office,

United States Courthouse, 225 Cadman Plaza East, Brooklyn, N.Y. 11201 during business hours. The Court will hold a hearing on September 24 and 25, 1984 at the Courthouse in Brooklyn at which class members will be given an opportunity to raise any objections they might have to such applications for fees and expenses.

4. What You Must Do If You Believe You Have Adverse Health Effects Related To Agent Orange Exposure In Or Near Vietnam And Wish To Make A Claim For Such Effects.

THE SETTLEMENT FUND WILL BE UTILIZED TO COMPENSATE CLASS MEMBERS FOR CERTAIN ADVERSE HEALTH EFFECTS ALLEGED TO BE RELATED TO AGENT ORANGE EXPOSURE. If the Settlement is approved, a proposed plan for the allocation and distribution of the Settlement Fund to class members will be developed and considered by the Court in subsequent proceedings. The following is a brief outline of the basic elements of the plan that the class representatives, have indicated that they expect to propose to the Court:

A. A portion of the Fund -- in an amount to be determined after the claims of class members have been formally submitted -- will be allocated and distributed to class members who suffer from presently manifested adverse health effects. It is not possible for all class members, regardless of the nature and/or degree of injury, to receive compensation. Accordingly, compensation under the Fund may be limited to designated kinds of adverse health effects and degrees of disability -- as yet to be determined -- which will be defined in the plan. In addition, in order to assure that the Fund will not be exhausted before all potential claims for unmanifested adverse health effects are processed, it may prove necessary to adjust the compensation for presently

manifested health effects so that funds are available for class members who may manifest compensable effects in the future.

B. A portion of the Fund -- in an amount yet to be determined -- will be set aside for future payment to those class members who have not, as yet, manifested adverse health effects but who may manifest such effects in the future. This will be done after determining the number and nature of the claims submitted now for presently manifested adverse health effects. Some of the portion of the Fund set aside for such future claims may later become available for additional payments to class members presently suffering from adverse health effects, depending on the number of future claims. The number and nature of such future claims should become clearer with the passage of time.

C. A portion of the Fund -- in an amount yet to be determined -- will be set aside to assist children, including both those born before 1984 (who are class members) and those born in or after 1984 (who, although not members of the class, may be entitled to assistance from the Fund). Those afterborn children who elect to apply for and receive assistance from the Fund will be subject to the terms and conditions of the Settlement.

D. The designated kinds of adverse health effects entitled to compensation under the Fund may be modified periodically, based upon various scientific studies, some of which are now in progress.

E. In an effort to establish procedures and formulas for the allocation and distribution of the Fund, it is important to determine as soon as possible the current number and nature of the claims made by class members. The prompt filing of claims will allow determinations of both the amount of compensation to

be paid each eligible claimant and the administrative mechanism best suited for the processing of such claims. Therefore, all class members who desire compensation for adverse health effects which are already manifested must submit the enclosed Claim Form on or before October 26, 1984 (unless the Court determines that there is good and special reason for failure to meet this deadline). All class members who later learn of adverse health effects allegedly related to Agent Orange exposure that are not now known to them must return the Claim Form within 120 days thereafter.

F. The Claim Form is a preliminary but essential step. If you submit a Claim Form, you will be requested at a later time to submit medical proof and other important information in order to support your claim. The procedure for submitting such proof and other information, as well as other requirements pertaining to the processing and approval of the claim, will be included in the plan referred to above. NOT EVERYONE WHO SUBMITS A CLAIM FORM WILL RECEIVE COMPENSATION UNDER THE PLAN.

G. In developing and administering a plan for the allocation and distribution of the Fund to class members, there will be consultations with medical, scientific, economic, actuarial, insurance, and other experts. In addition, representatives of the class -- including Vietnam veterans -- will play an important role in providing advice concerning the best methods of achieving maximum benefits for eligible class members and afterborn children.

All class members who submit Claim Forms will be mailed notices describing the proposed plan after it is developed and other class members will be given notice by publication. All class members will have full opportunity to

present to the Court at that time any objections they may have to that proposal, whether or not they have objected to the Settlement as a whole.

IF YOU WISH TO APPLY FOR COMPENSATION FOR ADVERSE HEALTH EFFECTS WHICH ARE ALREADY MANIFESTED, YOU MUST COMPLETE AND MAIL THE ENCLOSED CLAIM FORM POSTMARKED ON OR BEFORE OCTOBER 26, 1984. ADDITIONAL COPIES OF THE CLAIM FORM MAY BE OBTAINED BY WRITING TO THE ADDRESS LISTED IN PARAGRAPH 6 BELOW.

IF YOU FAIL TO FILE THIS CLAIM FORM POSTMARKED ON OR BEFORE OCTOBER 26, 1984, YOU WILL BE BARRED FROM MAKING ANY CLAIM FOR ANY ADVERSE HEALTH EFFECT THAT IS ALREADY MANIFESTED (UNLESS THE COURT DETERMINES THAT THERE IS A GOOD AND SPECIAL REASON FOR YOUR FAILURE TO MEET THIS DEADLINE). IF YOU LATER LEARN OF ADVERSE HEALTH EFFECTS ALLEGEDLY RELATED-TO AGENT ORANGE EXPOSURE THAT ARE NOT NOW KNOWN TO YOU, YOU MUST RETURN THE CLAIM FORM WITHIN 120 DAYS THEREAFTER.

NOW, THEREFORE, TAKE NOTICE:

1. All potential members of the plaintiff class as defined above and in the Notice given on or about March 9, 1984 who did not request exclusion on or before May 1, 1984 as provided therein are members of the plaintiff class and. will be bound by the proposed Settlement, if it is approved, and by the Court's further orders in this litigation.

2. The Court will hold hearings at the times and places indicated below for the purpose of considering whether the proposed Settlement is fair, reasonable and adequate and should be approved. Each hearing will commence at 10:00 a.m. August 8, 9, 10, 1984, United States District Court, 225 Cadman Plaza East, Brooklyn, N.Y. 11201

August 13, 14, 1984, United States District Court, 219 South Dearborn Street, Chicago, Illinois 60604

August 16, 17, 1984, United States District Court, 515 Rusk Avenue, Houston, Texas 77002

August 20, 21, 1984, United States District Court, 75 Spring Street, S.W., Atlanta Georgia 30303

August 23, 24, 1984, United States District Court, 450 Golden Gate Avenue, San Francisco, California 94102.

If the Court approves the proposed Settlement following these hearings, it will enter a final judgment dismissing the claims of the class against these defendants, but reserving jurisdiction over the Settlement Fund for the purpose of allocating and distributing its proceeds to members of the Class and otherwise administering the Settlement.

3. Any class member who objects to the proposed Settlement may appear at any one of the hearings to show cause why it should not be approved by the Court or may communicate with the Court in writing prior to the hearing.

4. All class members who desire to claim compensation from the Settlement Fund for adverse health effects which are already manifested must complete and mail the attached Claim Form postmarked on or before October 26, 1984. Failure to do so will bar any such claim (unless the Court determines that there is good and special reason for failure to meet this deadline).

5. The Court will hold a subsequent hearing in United States District Court, 225 Cadman Plaza East, Brooklyn, N.Y., on September 24 and 25, 1984, to consider whether the application for attorneys' fees and expenses to be filed with the Clerk no later than August 31, 1984, should be allowed in

whole or in part. Any class member objecting to any such application will be heard at that time.

6. All written communications by class members to the Court other than Claim Forms should be addressed as follows:

Clerk, United States District Court for the
Eastern District of New York
P.O. Box 887
Smithtown, NY 11787

Claim Forms should be sent to the address shown on the Form.

DATED: Brooklyn, New York
This 11th day of June, 1984

_____

Jack B. Weinstein, Chief Judge
United States District Court
Eastern District of New York

AGENT ORANGE CLAIM FORM

IMPORTANT: IF YOU BELIEVE YOU CURRENTLY HAVE ADVERSE HEALTH EFFECTS RELATED To AGENT ORANGE EXPOSURE, RETURN THIS FORM NO LATER THAN OCTOBER 26, 1984. FAILURE TO RETURN THE FORM BY THAT DATE WILL PREVENT YOU FROM GETTING MONEY FROM THE SETTLEMENT FUND.

(Please type or print all answers. Additional pages may be attached for extended answers.)

(To Be Filled Out By All Claimants)
Information about Claimant

Claimant's Name (Last, First, Middle): _____
Social Security Number: _____
(Or Identification Number for New Zealand and Australian Claimants)
Current Address (Street): _____
(City, State): _____ (Zip)_____:
Home Telephone Number (Area Code, Number): _____
Work Telephone Number (Area Code, Number):_____
Sex (Circle One):(M)ale (F)emale
Date of Birth: _____ ____ ____
MONTH DAY YEAR
If you have an attorney, please give his or her name, address, and telephone number:
Attorney Name:_____
Firm Name: _____
Address (Street): _____
(City, State): _____ (Zip)_____:
Attorney Telephone Number (Area Code, Number): (__),___

Information about Veteran
Veteran's Name (Last, First, Middle): _____

Social Security Number: _____
(Or Identification Number for New Zealand and Australian Claimants)
Current Address (Street): _____
(City, State): _____ (Zip)_____:
Sex (Circle One): (M)ale (F)emale
Date of Birth: _____ _____ ____
MONTH DAY YEAR
Date of Death:_____ ____ _____
(if deceased) MONTH DAY YEAR
When did Veteran serve in the Armed Services? _____
FROM: _____ TO: _____
MONTH DAY YEAR MONTH DAY YEAR

In what branch of service did Veteran serve? _____
Did Veteran serve in or near Vietnam?(Y)es (N)o
If yes, when? FROM: _____
TO:_____
MO DAY YEAR MO DAY YEAR
What were Veteran's primary duties (e.g., Primary MOW __
_____
Where was Veteran located in or near Vietnam? _____

DATES

To the best of your knowledge, was
Veteran sprayed with Agent Orange? (Y)es (N)o _____
Did Veteran see spraying of Agent
Orange? (Y)es (N)o _____
Was Veteran in areas that had been
previously sprayed with Agent Orange? (Y)es (N)o _____
How often was Veteran in areas sprayed
with Agent Orange? (Circle One)
(C)onstantly (F)requently (S)eldom (N)ever

What is the reason you answered YES to any of the above questions? _____
_____
_____

PART II

(To Be Filled Out If Claim Is Based On Adverse Health Effects <u>On Veteran</u> Alleged To Be Related To Agent Orange Exposure)

Please describe any medical problems of Veteran that any doctor has advised, or you believe, are related toAgent Orange:

_____
_____
_____- _____
_____- _____

[f you have listed any problems above, please list here what effect, if any, such medical problems have had in Veteran's work, daily activities, etc.:

_____- _____
_____- _____

PART III

To Be Filled Out If Claim Is Based On Adverse Health Effects <u>On Children</u> Alleged To Be Related To Agent Orange Exposure)

Please list here any birth defects of children which you believe are related to Agent Orange exposure:

Name of Child	Birth Date	Mother's Name	Nature of Birth Defect
1. _____	_____	_____	_____
2. _____	_____	_____	_____
3. _____	_____	_____	_____

If any child is deceased, state name and date of death:
_____

Name and address of parent or guardian of each child if different from claimant:

_____

_____

PART IV

(To Be Filled Out If Claim Is Based On Miscarriages Alleged To Be Related To Agent Orange Exposure)

Please list here any pregnancies that did not result in a live birth which you believe are related to Agent Orange exposure:
Name and address of woman: _____

_____

Relationship to Veteran: _____
Date(s) of Miscarriage(s): _____
Has the woman received any professional counseling or advice on the possible effect of Agent Orange on her unborn children? (Y)es (N)o
Describe nature of such counseling or advice: _____

_____

NOTE:

IF YOU LATER LEARN OF ADVERSE HEALTH EFFECTS ALLEGEDLY RELATED TO AGENT ORANGE EXPOSURE THAT ARE NOT KNOWN TO YOU, YOU MUST RETURN THIS FORM WITHIN 120 DAYS THEREAFTER.

_____

SIGNATURE OF CLAIMANT

ALL CLAIMS FOR PRESENT ADVERSE HEALTH EFFECTS THAT YOU BELIEVE ARE RELATED TO AGENT ORANGE EXPOSURE MUST BE SUBMITTED

BY MAILING THIS FORM TO THE FOLLOWING ADDRESS ON OR BEFORE OCTOBER 26, 1984:

AGENT. ORANGE COMPUTER CENTER
P.O. BOX 905
SMITHTOWN, NEW YORK 11787

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re	:	MDL No. 381
"AGENT ORANGE"	:	
Product Liability Litigation	:	
MICHAEL F. RYAN, *et al.*,	:	
Plaintiffs,	:	
-- against --	:	79 C 747
DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL, INC., and THOMSPON CHEMICALS CORPORATION,	:	
Defendants.	:	

[Excerpt of]

OBJECTION OF WILLIAM P. STIMSON TO PROPOSED SETTLEMENT OF CLASS ACTION

COMES NOW William P. Stimson ("Stimson") and, appearing herein, respectfully objects to the proposed Settlement Agreement annexed to the Notice of Proposed

Settlement of Class Action, dated June 11, 1984 ("Notice"), and to certain of the actions upon which such proposed Settlement Agreement ("Agmt.") is based. Stimson objects to the proposed Settlement Agreement principally on the ground that it permits defendants to impose an absolute limitation on their potential liability to the members of the plaintiff class wholly without regard for the number and nature of the class claims. Stimson also objects on the basis of, *inter alia*, the definition of the plaintiff class and the conflicts of interest of class counsel.

* * * *

[4] interests of the class, for the Court to ignore information soon to be available from those studies and to approve a settlement that operates to limit arbitrarily potential recoveries future claims for serious health effects whose causal relationship to Agent Orange exposure is not now clearly understood, particularly where such effects may not yet be manifested.

6. Stimson objects to the definition of the plaintiff class because class membership is determined according to whether a person's injury was caused by exposure to Agent Orange. Notice at 1-2. "Causation" -- which is denied by defendants -- is a fundamental issue in this litigation which, under the proposed plan, is to be determined only after the class members have had their rights limited by entry of judgment. Notice at 6, 7-9. Accordingly, the composition of the class is at this point indeterminate and based on speculation.[3]

[3] Moreover, given the medical profession's imperfect understanding of the consequences of exposure to Agent Orange, it is reasonable to anticipate that some plaintiff class members may presently suffer from adverse health effects related to Agent Orange exposure without suspecting the cause of such effects. It would have been misleading and improper for the Court to have authorized dissemination of a notice describing the plaintiff class solely on the basis of "causation" and

[5] 7. Stimson objects to the Settlement Agreement on the ground that it contemplates some plaintiff class members receiving no compensation, notwithstanding their having been injured as a result of exposure to Agent Orange. Notice ¶ A at 8. The Court has a duty to insure that counsel for the named plaintiffs do not abandon the interests of any members of the plaintiff class while advancing the interests of other "qualifying" class members.

8. Stimson objects to the definition of the plaintiff class and the Settlement Agreement on the ground that they include within their scope persons who have not yet manifested injury (Agent. ¶ 8 at 7) because:

(a) It is impossible presently to determine the identities of persons who may in the future manifest injury. As a consequence, the composition of the plaintiff class is indeterminate and based on speculation.

(b) Where plaintiff class members are not presently aware that they have been injured, they cannot be expected, on receipt of notices from the Court, to make informed decisions respecting their participation in this litigation.

(c) Under the laws of many states, the claims of such persons have not yet accrued and, accordingly, cannot be resolved in this litigation.

[6] (d) The Court cannot permit persons born after January 1, 1984 -- who are not members of the plaintiff class (Notice ¶ C at 9) -- to receive compensation from the proposed Fund because the Court has a duty to insure that counsel for the named plaintiffs represent only the interests of the members of the plaintiff class and do not sacrifice

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without including any statement as to the kinds of disabilities that are attributed to Agent Orange exposure. Although Stimson has not yet had an opportunity to review the contents of the notice given pursuant to the Court's December 16, 1983 order, the class description contained in the June 11, 1984 Notice suggests that the original notice may have suffered from the defect described in this footnote.

those interests in favor of non-members. This Court has no jurisdiction to grant relief to such persons who are neither named parties nor class members and who are strangers to the litigation.

(e) Because the Settlement Agreement contemplates that awards of compensation for presently manifested health effects may be adjusted downward to make moneys available for class members who manifest compensable effects in the future (Notice ¶ A at 8) and contemplates that the proposed Fund will not be finally disposed of for at least 25 years (Agmt. ¶ 4 at 6), it appears that for an extended period class members with presently manifested disabilities will have only a conditional and revocable right to compensation. To defer in such a manner the final adjudication of rights to compensation for presently manifested injuries is fundamentally unfair, unreasonable and inadequate and contrary to the best interests of the class.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In Re

MDL No. 381

"AGENT ORANGE"
Product Liability Litigation

----------x

United States Courthouse
Brooklyn, New York

August 10, 1984
10:00 o'clock A.M.

Before:

HONORABLE JACK B. WEINSTEIN, Chief U.S.D.J.

* * * *

[702] Honor might look at is the risk attendant upon the establishing of liability. At the first fairness hearing members of the Management Committee set out what they felt were some of the risks attendant upon the establishing of liability. And I would like to attempt to briefly touch upon those various factors.

The first factor, your Honor, is one which seems to have troubled you most greatly during the course of these hearings. And that's with respect to the ability of plaintiffs to prove causation. Your Honor has stated that your Honor must deal with the present and must deal with the state of scientific evidence as it exists today for purposes of proving that exposure to 245-T or dioxin or some combination thereof caused the particular ailment of those class representatives who were before your Honor. And so I would like to address myself specifically to the case which can be made, which could possibly have been made for proving causation with respect to the class representatives. I

cannot speak to all of the class representatives, your Honor, because I am not familiar with all their cases.

[703] With respect to two of those representatives, however, they are my clients and I am familiar with their cases. The first case, your Honor, which you had before you was the class representation of Danny Ford. Danny Ford, your Honor, had a radimile sarcoma. It is a rare soft-tissue sarcoma. The plaintiffs' Management Committee ably pulled together a team of experts who were prepared to testify with respect to general causation and specific causation concerning Danny Ford's causal link between exposure and a soft-tissue sarcoma.

If I may, your Honor, I would just like to identify some of those experts, their area of expertise, to indicate that there were credible scientist is prepared to testify to a causal link between his exposure and his problem.

Arthur N. Galston, Professor of Botany, Department of Biology, New Haven, Connecticut.

Dr. Alistair W. N. Hague, Department of Chemical Pathology, University of Leeds, Leeds, England.

Dr. Deborah Barsotti, Professor of Proctology, Philadelphia College of Pharmacy and Science, Philadelphia, Pennsylvania.

Dr. Ellen Silbergeld, Chief Proctologist, Environmental Defense Fund, Washington, D.C.

THE COURT: She was going to testify that his sarcoma was caused by his exposure?

MR. TAYLOR: No, your Honor. In particular she

* * * *

[724] In researching the cases, those that exist in the Second Circuit, we have found additional factors which courts have suggested that might be looked at in determining the adequacy, reasonableness and fairness.

One of those is the TBK Partners, Ltd. case versus Western Union Corporation, 675 Fed. 2nd, 456, where the Court of Appeals suggests that a judge looking at a settlement might inquire whether there has been a release of a claim which was not asserted within the class action or not shared by all class members which represents an advantage to the class by an uncompensated sacrifice of the unrepresented claims.

In this instance, your Honor, we had no class representative who was representing the estate of someone who had died, and it is a tragic situation but then those veterans are dying they are dying at a very young age and because they have died at a young age, their estate would have received in terms of lost income, earned over their lifetime, a substantial amount of money.

In the absence of a class representative to protect their interests, I suggest that there may have been a possible compromise and I only suggest that you inquire into this. I have no information as to this, with respect to their particular interest.

[725] In that same vein, your Honor, although with a slightly different twist, the class counsel has a fiduciary duty to a class and only to that class and they may not represent competing interests.

Within the settlement agreement are two proposals, which trouble me and I suggest that your Honor inquire into that.

One is that there is a provision which allows the defendants should they have a state court judgment rendered against them to go to the settlement fund, which is for class members and pull the money out of that settlement fund and give it to those who have been successful in a court of law, up to $10 million, with some provision for doing that in the future should there be excess monies.

What your Honor might inquire is, has there been a conflict of interest here which has not been resolved perhaps

and an appointment of an attorney to represent that particular interest.

THE COURT: I am not sure I follow you.

What interest?

MR. TAYLOR: I have some difficulty with that argument myself, your Honor. It is more a concern

* * * *

[729] THE COURT: Good.

MR. TAYLOR: Again, in this area of representation, the class was redefined to include service persons who had not manifested injury, nor claimed injury.

THE COURT: Correct.

MR. TAYLOR: There was no class representative in this class action who had not manifested injury and who had not claimed injury. So to that extent --

THE COURT: We have a number of people who have testified at these hearing who say we don't have an injury now, but we are concerned about the future. They are protected by the settlement to the extent that the settlement can protect anybody. They are within the class.

So if they have a manifestation in the future, they are entitled to do some compensation. Whatever it is.

Part of the problem of structuring the payments will be to take care of what has been referred to as the tail of possible claimants.

MR. TAYLOR: Your Honor, I respectfully submit that that may be a different question from whether they were adequately represented at time of negotiations to be sure that they had enough money **[730]** in that fund to provide them, in the future and their-

THE COURT: Well, at the second stage, we will certainly hear from them.

But again, to appoint another attorney to represent that sub-group would just, in my opinion, increase the amount of legal fees, which is what all of us want to keep to a bare minimum.

There are lots of arguments and classes and sub-classes, but if we appoint attorneys and guardians ad litem for everybody who might have a -- somewhat of a conflict of interest, there is hardly going to be any money left for the veteran.

That's the problem here.

To try to keep the transactional costs at a minimum, at the same time being fair. It is difficult.

MR. TAYLOR: Yes, your Honor.

I do not envy your task. You have done a tremendous job.

THE COURT: No, please. I haven't done anything yet. I'm just here listening.

I am not questioning you in any hostile way. I'm questioning you in order to better understand and work with you in developing the problem as you appreciate, of course.

[731] MR. TAYLOR: That is clearly understood.

I appreciate the questions and more than welcome them.

Your Honor, the case of Weinberg at 698 Fed 2nd, 77, suggests that if a class is newly redefined, that there must be notice to that new class and there must be some affording them of an opportunity to opt out.

(Continued on next page.)

[732] THE COURT: How is the class redefined?

MR. TAYLOR: Your Honor, originally, the class arguably was only those Viet Nam veterans who had manifested an injury and who had claimed an injury.

THE COURT: The class as I defined it was broader, wasn't it?

MR. TAYLOR: As you eventually defined it, that's correct, your Honor.

THE COURT: The notice went out after I defined it, didn't it?

MR. TAYLOR: Your Honor, I believe that the settlement notice -- let me not speculate. If I may, I will just find the appropriate documents.

THE COURT: I defined the class in my class action opinion and then notice went out on that class as then defined.

I think the class as originally defined, included those who may manifest later but I may be mistaken and if I am I will be happy to have another look at it.

MR. TAYLOR: Your Honor, I think that this is something you probably will be -- will probably be taken care of in a subsequent written submission.

I will look carefully at the documents.

THE COURT: It is a question of interpretation **[733]** of original language. I believe the original language properly interpreted included after manifestations.

MR. TAYLOR: Your Honor, an objection to the settlement which I have frequently heard by my clients and also one which is to be found in the -- as a question to be asked by your Honor as suggested by a Court of Appeals in the 5th Circuit, Parker versus Anderson, 677, Fed. 2nd, 1204, is whether the amount of attorneys' fees was approved before or at the fairness hearings.

Certainly, my clients would like to know the total amount of the settlement fund prior to saying that it in fact is fair or unfair.

THE COURT: Well, I can't give you that because we are not going to get the applications until after these hearings are over.

However, we will have a public hearing on the attorneys' fees, so if you wish to be heard, I'll be glad to hear you. But I can't give you that information now.

I understand your problem.

MR. TAYLOR: Your Honor, I am pleased to hear that there will be subsequent hearings with respect to the structure and the protocol for payments of monies out of the fund, and perhaps once that is **[734]** known to my clients, they might better be able to determine the adequacy and the fairness of this hearing.

THE COURT: I have already issued an order, the magistrate has issued a form to make application. I forget the dates, but they are in my written opinions, and they are in the notice, with respect to when the applications have to be in. I think we have moved the hearing from, what is it, September 25th to 26th.

THE CLERK: Yes, your Honor.

THE COURT: So on September 26th we will have the first day of hearings on the applications for fees. At that time, you will have everybody's fees on record and anybody can go down to the courthouse and examine everybody's application.

MR. TAYLOR: Your Honor, may I inquire -- it is not clear in my own mind. Will the approval, should it come from the court for the settlement, will that occur after both the protocol hearings, the hearings to determine the standard for who will receive how much as well as after the -- the attorneys' fees have been established?

THE COURT: My present plan is to hold the

* * * *

[736] before me because you have always been fully prepared and very helpful.

Thank you very much.

MR. TAYLOR: I enjoyed being here, your Honor. Have a good day.

THE COURT: Next.

THE CLERK: Mr. Christopher Gregory.

MR. GREGORY: Good afternoon, your Honor. I'm Christopher Gregory.

THE COURT: Good afternoon.

MR. GREGORY: I'm from the Commonwealth of Massachusetts. I'm the director of the Agent Orange Program which operates out of the office of Commissioner of Veterans Services in Massachusetts.

THE COURT: Yes, I've read some of your articles. They are very good.

MR. GREGORY: Thank you.

THE COURT: I must say.

MR. GREGORY: Thank you very much.

I'm joined this afternoon by some colleagues from Massachusetts. We have come to tell you what we've been doing the past month.

Our program is set up primarily to conduct research. We have a legislative mandate to conduct research.

[737] We also have a small component of our program is four Out-Reach & Service.

When we first heard of these hearings, we quickly convened a series of meetings around the state, to try to establish the opinions of the veterans of Massachusetts.

The Commissioner of Veterans Services, John Halachis is himself opposed to the settlement and wishes to be recorded as such.

But we attempted to set up these hearings, seminars, to effective sample the opinions and the sentiments of the veterans.

We set them up in cities and towns around the state in Summerville, Lynn, Boston, Wuster, Greenwild, New Bedford, Springfield and North Hampton.

We also attempted as we were able to sample the opinion of organizations that we felt represented veterans and interested individuals.

There was in our sampling we found, which was not incidentally conducted along a rigid demographic line or with votes or with other clear markers. We were really just trying to examine the sentiments. It is a complicated question to ask for a veteran. Also, we found there was not enough information to ask people to -- for clear opinion. We were educating to parts of this question as we went along.

[738] We found that a minority of the veterans were for the settlement, as it is presented.

I would say, sampled 700 or so veterans, this minority wedge was quite small. If I had to -- if I had to name a number I would say probably 5 percent or less.

I think there was two reasons that stood out why the veterans who were for the settlement were for the settlement.

There was a very small number who were quite cynical about the proceedings at all and believed that, cynically believed I think, that they have to accept whatever is given them and that they have -- that their complaints are not taken at all seriously and this is the best chance that they will ever have to make a case.

I think the second one represents a greater portion of the minority. I think that is characterized by an instinct that for helping those people, their fellow veterans, that they see suffering.

I think in most cases those veterans would themselves be willing to give up benefits that might be coming to them if they felt that that would -- that by taking those benefits, would deny someone who is in worse straits than they. I think this is a very generous impulse.

[739] As I said, though, the overwhelming majority was against this settlement and they expressed themselves quite clearly.

In that way, in some -- some meetings were unanimously against the settlement. Some of the sentiment was quite vehement.

Some four points stand out why they were against the settlement.

The first I think is they were confused on the facts of the settlement and even though they had in many cases read the literature that had come from the court and from other organizations, they were still confused and lengthy explanations did not seem to help as much as they might.

They really didn't know what they were deciding. They felt that their -- I think that their lack of knowledge of what they were deciding created quite a bit of suspicion.

I think also they weren't sure if a settlement is accepted what sort of influence they would have over the process of the protocol of how appeals are to be made to the court for compensation.

[740] More than one veteran expressed that the process should be reversed, that they should clearly understand what the process would be before they were asked to decide one way or another.

The second point that I think came out most strongly was that there is a basic mistrust of any settlement where there is no acceptance of responsibility for the damage that they believe has been done to them and to their children.

Third, I don't believe they believe that the amount of money is capable of providing the relief that they need.

And fourth I think is a bit more complicated but I'll do my best.

(Continued on next page.)

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[769] tion so that the plaintiffs can receive treatment as well as compensation, then I would like to propose to the court that this documentation not be returned to the defendants, but

instead be released to the public so that it may be used for research, organizations, to develop diagnostic and treatment techniques to be used hopefully to resolve some of the medical problems of the plaintiffs in this case.

If you are inclined to certify this agreement, I would implore you, your Honor, to extend the period of opting out to the October 26th deadline, as you have for the opting-in process.

Now, as to the question before the court, is this proposed settlement fair? Your Honor, it is my very humble opinion that the proposed agreement as it is now structured does not have one ounce of fairness and definitely is not in the best interest of the plaintiffs in this case.

Veterans of the South Viet Nam conflict who have served honorably when called to duty by this country.

Your Honor, I have listened intently over the past three days to the testimony presented to you. It is my perception that the opinions expressed by the hard-core combat veterans after having

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION PURSUANT TO RULES 52(B) AND 59(E) TO RECONSIDER THE ORDER OF JANUARY 7, 1985 WHICH APPROVED THE SETTLEMENT

Dated: March 7, 1985

Robert A. Taylor, Jr.
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400

* * * *

[93] incident of deaths due to *stomach cancer* in railroad workers exposed to phenoxy herbicides was also reported in Axelsson and Sundell (1977) (2 deaths; .33 expected)[71] and in an unpublished update,[72] malignant mesenchymal tumors were reported by Hardell (1977)[73] in Swedish forestry and agricultural workers. Hardell suspected exposure to phenoxy herbicides as the cause. *Id.* In Hardell and Sandstrom

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[71] Axelsson, et al. (1977). Phenoxy acids and cancer. *Lakartidningen* 74 (35):2887-2888.

[72] Axelsson, et al., (undated) Herbicide exposure and tumor mortality: An epidemiological investigation on Swedish railroad workers. Unpublished paper.

[73] Hardell, L. (1977) Malignant Mesenchymal tumors and exposure to phenoxy acids -- a clinical observation. *Lakartidningen* 74:2753.

(1978)[74] and Hardell and Sandstrom, (1979),[75] a statistically significant increase in the incidence of malignant mesenchymal soft-tissue sarcomas was reported among forestry workers exposed to phenoxy herbicides and chlorophenols. Erikson, et al. (1979)[76] similarly reported statistically **[94]** significant increases of *soft-tissue sarcomas* among Swedish forestry workers exposed to 2,4-D, 2,4,5-T, MCPA and phenoxypropeonic acids. Workers in occupations with a history of exposure to phenoxyacetic acids were reported to be at a greater risk of developing lymphoma with either Hodgkins disease or non-Hodgkin's lymphoma. *See*, Hardell (1979)[77] and Hardell, et al. (1980).[78] When Honchar and Halprin reviewed data from industry studies finding no increased incidence of soft-tissue sarcomas, they found that 2.9% of the 105 death among workers exposed to 2,4,5-T (possibly with dioxin) were from soft-tissue sarcomas when only 0.07% were expected in a similar age population. Honchar and Halprin (1981).[79]

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[74] Hardell, et al., (1978) Malignant mescuchymal soft-tissue tumors and exposure to phenoxy acids or chlorophenols. *Lakartidningen* 75:3535-3536.

[75] Hardell, et al., (1979) Case-control study: Soft-tissue sarcomas and exposure to phenoxy acetic acids or chlorophenols. *Dr. J. Cancer.* 39:711-717.

[76] Erikson, et al., (1979) Case control study on malignant mesenchymal tumors of the soft tissue and exposure to chemical substances. *Lakartidningen* 76:3872-3875.

[77] Hardell, L. (1979) Malignant lymphoma of histiocytic type and exposure to phenoxy acetic acids or chlorophenols. Lancet 1 (8106) 55-56.

[78] Hardell, et al. (1980) Malignant lymphoma and exposure to chemical lymphoma and exposure to chemical substances, especially organic solvents, chlorophenols and phenoxy acids. *Lakartidningen* 77 (4) :208-210.

[79] Honchar, et al., (1981) 2,4,5-T trichlorphenol, soft tissue sarcoma. *Lancet* Jan. 31:268-269.

After a study of 110 workers, 22.7% of whom reported exposure to phenoxy herbicides, *Erikson*, et al. (1981)[80] **[95]** reported a relative risk of soft-tissue sarcomas among the exposed to be 6.8 times greater than among the unexposed.

Chlorinated phenols have been found to be contaminated with polychlorinated dibenzo-p-dioxins. Hardell, et al. (1982)[81] reported a relative risk 6.7 times greater for *nasal and nasopharyngeal cancer* among workers exposed to chlorinated phenols than for unexposed workers.

After a case control study of 123 men with non-Hodgkin's lymphoma, Olson and Brandt (1981)[82] concluded that cutaneous lesions of *non-Hodgkin's lymphoma* might be uniquely associated with exposure to polychlorinated dibenzo-p-dioxins contaminants of phenoxy herbicides and chlorophenols. When Theiss and co-workers (1982)[83] studied the mortality of 74 workers who had been exposed to TCDD and trichlorophenol during a process accident, they concluded that the increased incidence of *stomach carcinomas* among the exposed cohort could not be explained by **[96]** chance. Bishop and Jones (1981)[84]

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[80] Erikson, et al., (1981) Soft-tissue sarcomas and exposure to chemical substances. *See also*, Hardell, L., Relation of soft-tissue sarcoma, malignant lymphoma and colon cancer to phenoxy acids, chlorphenols and other agents. *Scand. J. Work. Environ. Health* 7:119-130.

[81] Hardell, et al. (1982) Epidemiological study of and nasopharyngeal cancer and their relation to phenoxy acid or chlorophenol exposure. *Am. J. Industrial Med.* 3:247-257.

[82] Olson, H. and Brandt, L. 1981 Non-Hodgkin's lymphoma of the skin and occupational exposure to herbicides. *Lancet* (2):579.

[83] Theiss, et al., (1982). Mortality study of persons exposed to dioxins in a trichlorophenol process accident in the BASF AG on November 17, 1953. *Am. J. Ind. Med.* 3:179-189.

[84] Bishop, et al., 1981. Non-Hodgkin's lymphoma of the scalp in workers exposed to dioxin (letter). *Lancet* (2):369.

reported two cases of *non-Hodgkin's lymphoma* in workers at a plant that manufactured pentachlorophenol (contaminated with PCDD). Only 0.28 *non-Hodgkin's lymphomas* are expected among a work forced *the size of the group studied.* Johnson, et al. (1981)[85] reported a *fibrosarcomatous mesothelioma* and *liposarcomas* in a father and son who worked at a chlorinated phenols plant. In 1981, Moses and Selikoff (1981)[86] reported a malignant *Schwannonma (soft-tissue sarcoma)* in a Monsanto worker who had a history of exposure to phenoxy herbicides.

Not surprisingly, in Midland County, Michigan, where the Dow Chemical Company manufactured "Agent Orange," the rates of mortality from *soft-tissue and connective tissue* cancers in white females were 3.8 times higher than the national average for the period 1960-1969. During that period Dow was disposing of its waste streams and delivering "Agent Orange" to the Government. After greater latency, the rate was 4.0 times higher than the national average (1970-1978). These findings **[97]** were reported by the Michigan Department of Health in 1983.[87]

Concerned about an unusual clustering of rare cancers in New South Wales, Australia where 2,4,5-T spraying had occurred, caused MacLennan, et al. (1982)[88] to compared the incidence of cancers and mortality from cancer experienced by people living in the suspect area and an area where 2,4,5-

[85] Johnson, et al., (1981) Soft tissue sarcomas and chlorinate phenols. *Lancet* (2):40.

[86] Moses, M. and Selikoff, I.J., (1981) Soft-tissue sarcomas, phenoxy herbicides, and other chlorinated phenols. *Lancet* (1):1370.

[87] Michigan Department of Public Health (1983) Evaluation of soft and connective tissue cancer mortality rates for Midland and other selected Michigan counties compared nationally and statewide. May 4, 1983.

[88] MacLennan, et al., (1982) Cancer in the Blue Mountains of New Smith Wales. *Med. J. Aust.* 2:319-323.

T spraying was believed not to have occurred. MacLennan, and co-workers found a higher-than-expected incidence of *cancer of the pancreas, multiple myeloma, myeloid leukemia* and *melanoma* in males.

Although a self selected population, it is interesting to note that the incidence of *malignant neoplasms* of the *buccal cavity* or *pharynx* (7.9%) and *lymphomas* (20.0%) among 84,456 registrants on the Agent Orange Registry were significantly higher than the incidence of those cancers in all United States males of a similar age group. *See*, Young, et al. (1983)[89]

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[117]

Hardell (1979)	Lymphoma	Not an epidemiological study; 14 of 17 lymphoma patients had a history of exposure to phenoxyacetic acids and chlorophenols
Hardell et al. (1980)	lymphoma (+)	41 of 149 with lymphoma had a history of exposure to phenoxyacetic acids; the relative risk of a lymphoma from exposure was 4.8 times higher than for unexposed persons in the study
Honchar & Halprin (1981)	soft-tissue sarcomas (+)	Of 105 workers exposed to TCP or 2,4,5-T 2.9% died of

[89] Young, et al., (1983) Chlorinated dioxins as herbicide contaminants. *Enviro. Sci. Technol.* 17:531A-540A.

		soft-tissue sarcomas when only 0.07% deaths were expected.
Erikson, et al. (1981)	soft-tissue sarcomas (+)	Relative risk of soft-tissue sarcoma from exposure to phenoxy herbicides was 6.8 times higher than for unexposed persons in the study population
Hardell (1981)	soft-tissue sarcomas (+)	The relative risk for soft-tissue sarcomas among those exposed to chlorinated phenols or phenoxy herbicides was 8.2 times higher than for unexposed persons it the study population; reanalysis of earlier data
Hardell, et al. (1982)	nasal and nasopharyngeal cancer (+)	Chlorinated phenols contain PCDD's; the relative risk for nasal and nasopharyngeal cancer from exposure to chlorinated phenols was 6.7 times higher than for unexposed persons it the study
[118] Smith, et al. (1982)	soft-tissue sarcomas	When definitively exposed considered by year of birth, relative risk of soft-tissue sarcomas from exposure to phenoxy herbicides was 1.7 times higher than for

		unexposed in the study
Olson & Brandt (1981)	cutaneous presentation of non-Hodgkins lymphoma	cutaneous presentation of non-Hodgkin's lymphoma is exceedingly rare
Barthel (1981)	bronchial carcinoma (+)	Pesticide applicators who used 2,4-D and 2,4,5-T and other pesticides were studied; the pesticide applicators were 2.1 times as likely to die of bronchial carcinoma than population statistics indicated could be expected
Milham (1982)	Hodgkin's disease; soft-tissue sarcoma (+)	A proportional mortality ratio (PMR) found to be increased among farmers for soft-tissue sarcomas and pulp and paper mill works for Hodgkin's disease; professions reported exposure to phenoxy herbicides or chlorinated phenol which probably contained PCDD's
Theiss & Coworkers (1982)	stomach carcinomas (+) colon cancer (+)	Cohort study with 2 control groups;
Bishop & Jones (1981)	non-Hodgkin's lymphoma	Out of 158 workers exposed to pentachlorophenol (with possible PCDD

contamination) 2 cases of non-Hodgkin's lymphoma were observed; the expected incidence was only 0.28

* * * *

[155] within the range of reasonableness in light of the best possible recovery. The settlement must be rejected.

There were minimal risks attendant trial of the class action representatives' cases. This has been acknowledged by the Plaintiffs' Management Committee. They have consistently taken the position that the cases would have been won at the trial level. Victor Yannacone and Benton Musslewhite confirm the absence of risks attendant trial. Only with respect to an appeal have members of the Plaintiffs' Management Committee expressed concern. What the Court of Appeals might do, however, is not a basis upon which this Court may accept an inadequate, unreasonable and unfair settlement.

In sum, a review of the factors set forth in *Grinnell I* call for the Court to reconsider its approval of the $180 million settlement and to find that settlement to be unfair, unreasonable and inadequate. Additional considerations call for the Court to vitiate the settlement.

III.

In Addition to the Grinnell Factors, There Are
A Number of Other Reasons to Vitiate The Settlement

A. The Class Action Representatives May Have Been Inadequate

No class representative represented class members who were deceased or who had not manifested injury. All of the class representatives were living and had manifested injury. The **[156]** interest of those who had died or not yet

manifested injury were not protected. Indeed, the interests of living class representatives who had manifested injury were antagonistic to the interests of those who had died and to those who had not yet manifested injury. The more money set aside for those who had died and for those who had not yet manifested injury, the less money available to those who are living and who have manifested injury.

In fact, the interests of those who have died may have been sacrificed to obtain a settlement for the living class members. In seeking a 23 (b) (1) (B) certification, the class action representatives stated to the Court that the wrongful death and survival claims *alone* would amount to $10 billion. *See*, Special Master's Report Re: Applicability of 23 (b) (1)(B), Docket No. 1562a at 7. The settlement was for only $180 million. A question is clearly raised as to whether the claims of those who had died were sacrificed to obtain a settlement for the living class members.

Special Master Feinberg's distribution scheme suggests that the interests of those who have died are still being sacrificed for the interests of those who are living. Under Special Master Feinberg's proposal, wrongful death and survival claims will be limited to $5,000 dollars to be paid out over 10 years while those living class members with cancer may receive a maximum of $25,000. *See*, Exhibit 9. Indeed, the class action **[157]** representatives may not have even adequately protected their own interests much less the interests of those class members they represented.

According to three class action representatives, the class action representatives were not consulted about demands, or counter offers during the settlement negotiations but rather were requested to approve a *fait accompli*. Prior to becoming class representatives, David Lambiotte and Danny and Christine Ford were Ashcraft & Gerel's clients. After the settlement negotiations, all three class representatives advised Robert A. Taylor, Jr., a member of the firm of Ashcraft & Gerel, that they had not been consulted during the

course of settlement negotiations and were simply asked to approve the settlement once completed. *See*, Exhibit 1.

In approving this settlement, the Court has an obligation to be sure that the class representatives were adequate representatives of the class as originally certified and as enlarged by the settlement agreement. *Malchman v. Davis*, 706 F.2d 426, 432 (2nd Cir. 1983).

> Not only must the court examine whether plaintiffs had interests antagonistic to those of other class members (citations omitted), but also whether the class representative 'possess[ed] the same interest and suffer[ed] the same injury' as the class members (citations omitted).

Id. at 433. As set forth *infra*, the class definition in the Legal Notice of Pendancy of Class Action was altered by the **[158]** Settlement Agreement to include the claims of those who had not yet manifested injury. All of the class representatives had manifested injury. Not one of the class representatives was an adequate representative of those class members who had not yet manifested injury.

The Court must also take care to assure that there is no release of claims not shared by all members of the class, e.g. wrongful death claims, which represents an advantage to the class by the uncompensated sacrifice of those claims. *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2nd Cir. 1982). The class action representatives were inadequate representatives of those class members with wrongful death and survival claims. They had not suffered those injuries. Furthermore, there may have been an uncompensated sacrifice of the wrongful death and survival claims to advantage the class. The future claims of those who had not yet manifested injury may have been sacrificed in order to obtain a settlement for those class members who had manifested injury. Finally, the class action representatives were totally excluded from the settlement negotiations. They could not, therefore, protect their own,

much less class members' interest. The Court must inquire into these matters or permit discovery by counsel prior to any finding that the settlement is fair, reasonable and adequate. **[159]**

B. Statements Under Oath By Benton Musslewhite And Victor J. Yannacone, Jr. And Certain Memoranda Released By Victor J. Yannacone, Jr. Indicate That Class Action Counsel May Have Been Inadequate

A statement under oath by Victor J. Yannacone, Jr., a copy of which is found as Exhibit 21, and certain memoranda released by him, copies of which are found as Exhibit 11, raise serious questions as to the adequacy of class action counsel. Class action counsel must have been adequate representatives of the class from the beginning to the end of the litigation. Any breach in adequacy may have materially affected the litigation and adversely impacted on settlement. According to Mr. Yannacone, class action counsel were clearly inadequate to the task of protecting class members' interests from shortly after the organization of Yannacone & Associates (hereafter, also the Consortium) to approximately May, 1983 when he removed himself from the Consortium.

Mr. Yannacone's statement under oath paints a distressing picture of small Long Island firms lacking the finances, manpower and desire to be class action counsel. Unless otherwise indicated, the following information was obtained from Statement Under Oath by Victor Yannacone, Jr., Exhibit 21. Page references are to Mr. Yannacone's statement. Ashcraft & Gerel does not vouch for the truth or veracity of Mr. Yannacone's statements but only suggests that his statements under oath raise serious questions as to the adequacy of counsel **[160]** and as to the consequent fairness, reasonableness and adequacy of the settlement.

Yannacone & Associates was established in September, 1979 (p. 12). The Consortium consisted primarily of small firms (pp. 31, 38-39). A number of the members did

principally defense work in personal injury cases (pp. 31-32). Other than Mr. Yannacone, none of the members of the Consortium had experience in large product liability or mass toxic tort litigation (p. 43). Due to the size of their offices and the press of other practice sustaining litigation, each of the member firms assigned only one attorney on a part-time basis (p. 31). No law clerks or paralegals were assigned to the case (p. 39).

Among the firms in the Consortium, only one high speed copier existed (pp. 37-38). That copier was in Mr. Yannacone's possession. All the other firms had only small convenience copiers (p. 38). At various stages, only a few firms in the Consortium had any word processing capability (pp. 40-41). An attempt at computerization was made but aborted for financial reasons (pp. 39-40, 42).

From the inception of Yannacone & Associates to approximately April, 1983, members of the Consortium refused to review microfilmed documents produced by the government and defendants (pp. 34-36). The government began producing documents on microfilm in April of 1981. By April of 1983, over **[161]** 283 rolls of microfilm had been produced by the government. Mr. Yannacone purchased some of the rolls in July of 1982 (p. 34). Mr. Keith Kavanaugh and Mr. Yannacone were forced to read approximately 140 rolls without any help from other members of the Consortium (pp. 34-36). Requests by Mr. Yannacone for help from Consortium members went unheeded (p. 37). The documents produced by the chemical companies went unreviewed with limited exception (pp. 35, 41). According to Mr. Yannacone, "[a] decision was made . . . that no attention would be paid to causation, and no attention would be paid to preparing any document search even in the area of liability" (p. 34). Apparently, a decision was also made "largely on the basis of costs" that no depositions would be taken by plaintiffs until defendants had completed their deposition discovery (p. 59).

When motions for summary judgment were made on the government contract defense in April of 1983, Yannacone & Associates was unprepared to respond (p. 69-69A). Dow, Hercules, Thompson Hayward (now T.H. Agriculture & Nutrition Company), Uniroyal and Thompson Chemical Company moved for summary judgment. Ashcraft & Gerel, which had become a member of a newly formed Plaintiffs' Management Committee only a month before, was called upon to write the oppositions to three out of the five motions for summary judgment (pp. 68-69A). Ashcraft & Gerel was originally asked to write the oppositions to Dow's and Thompson Hayward's motions for summary judgment. Having **[162]** completed that task, Robert A. Taylor, Jr. of Ashcraft & Gerel was asked the day before it was due to also write the opposition to Thompson Chemical Company's motion for summary judgment. He did so (pp. 68-69A). Ashcraft & Gerel also provided all the documents necessary for a member of Yannacone & Associates to write the opposition to Uniroyal's motion for summary. *See*, Affidavit of Robert A. Taylor, Jr., Exhibit 1. Only the oppositions to Hercules' and Uniroyal's motion for summary judgment was not written by Ashcraft & Gerel. *Id.* Summary judgment was granted to defendant-Hercules by the Honorable George C. Pratt. *See*, Affidavit of Robert A. Taylor, Jr. for an explanation as to why Ashcraft & Gerel as *non* MDL lead counsel or class counsel from the beginning of the litigation to March, 1983 was prepared to respond to defendants' motions for summary judgment approximately two months after joining the Plaintiffs' Management Committee.

By May of 1983, when Mr. Yannacone removed himself from Yannacone & Associates, between 150-200 depositions had been taken by defendants (pp. 54, 58-59). Numerous requests by Mr. Yannacone prior to May of 1983 for aid in reviewing the depositions met with no response from the other members of Yannacone & Associates (p. 54).

Apparently, the primary problem was finances. There were insufficient finances to pay for deposition transcripts;

telephones; computers and computer services; clerical personnel and computer key operators; travel; copying; microfilm machines **[163]** and the miscellaneous expenses associated with litigation (pp. 34, 37-38; 40, 42; 51-53; 57-59). Importantly, a refusal by the Consortium to commit time and resources made it impossible to move for partial summary judgment on elements one and two of the government contract defense (p. 66). A lack of adequate finances appears to have also been at the root of major personality clashes within Yannacone & Associates which paralized that group. (Musslewhite Statement, p. 10).

Mr. Yannacone withdrew from Yannacone & Associates in May of 1983. In late 1983, Yannacone & Associates asked permission to be relieved as MDL lead counsel and class action counsel. Yannacone & Associates cited financial difficulties as the reason for the request. After being thwarted in an attempt to gain control over the litigation, Ashcraft & Gerel withdrew as a member of the Plaintiffs' Management Committee. *See*, Affidavit of Robert A. Taylor, Jr., Exhibit 1, for an accounting of that withdrawal and related matters.

A number of documents released to the news media by Victor J. Yannacone, Jr. (which served in part as the basis for an article by The American Lawyer in April of 1984) call into question the adequacy of MDL and class action counsel. A number of those documents were provided to Ashcraft & Gerel by Mr. Yannacone after he had furnished copies to the media. Some of those documents are to be found as Exhibit 11. A copy of The American Lawyer article is also to be found as Exhibit 12. A **[164]** number of Mr. Yannacone's contemporaneous documents corroborate his statements under oath. Mr. Yannacone's statements under oath and his contemporaneous documents raise serious questions as to the adequacy of class action and MDL lead counsel from the inception of the litigation to May of 1983. The inadequacy which Mr. Yannacone alleges to have existed apparently had an impact on the settlement as seen from Mr. Benton

Musslewhites' Statement Under Oath, a copy of which is found as Exhibit 22. Unless otherwise indicated, the following information was obtained from Mr. Musslewhite's Statement Under Oath. Page citations are to the transcript of that statement.

Mr. Musslewhite first became involved in the Agent Orange litigation in 1979 through Tod Ensign, Counsel for Citizen Soldier, a Vietnam Veterans' organization (p. 5). He joined ranks with Messr. Scotty Baldwin and Melvin Block in representing a large number of Vietnam veterans (pp. 5-6, 7). Yannacone & Associates, however, was established as MDL lead counsel and Mr. Musslewhite anticipated entering into a monitoring status (p. 8). With time, however, Mr. Musslewhite came to recognize that Yannacone & Associates may not have been adequately protecting his clients (p. 8-9). Yannacone & Associates was not purchasing copies of microfilmed documents produced by the government and was not taking depositions (Statement Under Oath By Victor Yannacone, Exhibit 21, pp. 34-37, 59). Consequently, Mr. Musslewhite joined Ashcraft & Gerel in a motion to establish **[165]** a steering committee for the purposes of pretrial discovery. Neither Mr. Musslewhite nor Ashcraft & Gerel moved to be made class or MDL counsel. The motion was solely to establish a steering committee to conduct discovery (pp. 9-10). Of greater importance, Ashcraft & Gerel and Benton Musslewhite recognized the magnitude and expense of the Agent Orange litigation and requested the Court to select counsel from around the country based on their MDL and class action experience and their ability to fund the litigation (p. 10). The Honorable George C. Pratt denied that motion finding that Yannacone & Associates had the skill, desire and financial ability to see the Agent Orange litigation to its end.

In February of 1983, Yannacone & Associates was in such financial troubles and spread so thin that it invited Mr. Musslewhite and Steven Schlegel to become members of a new Plaintiffs' Management Committee. Ashcraft & Gerel

became a member in March of 1983. From February of 1983 to September of 1983, Mr. Musslewhite witnessed the further degeneration of Yannacone & Associates through bitter feuding and financial strangulation (p. 14).

When Ashcraft & Gerel and then Yannacone & Associates withdrew from the Plaintiffs' Management Committee, only Steven Schlegel, Benton Musslewhite and Thomas Henderson, who had been brought aboard only a month earlier, remained. They did not **[166]** have the finances or manpower necessary to continue the litigation. Money and manpower was obtained by entering into a fee sharing and expense reimbursement scheme with six (6) other law firms.

The Plaintiffs' Management Committee's internal expense reimbursement and fee sharing arrangement raises serious questions as to the adequacy of representation afforded by class counsel. A copy of that agreement is found as Exhibit 13. On December 7, 1983, Stephen J. Schlegel, Thomas W. Henderson and Benton Musslewhite, who had been appointed as the Plaintiffs' Management Committee, entered into an agreement with six other attorneys to obtain additional manpower and financing. The agreement was executed only five (5) months before trial was scheduled. Under the terms of the agreement, those who advanced costs of the litigation were to receive three (3) times the amount of money they advanced, prior to the distribution of any other monies. The remainder of the award was to be divided as follows: 50% in equal shares among all committee members, 30% in proportion to hours worked, and 20% based on factors paralleling those considered by Courts in granting fees. "The result would be that those who advanced money would be advantaged to an extraordinary degree over those who gave their time and skill to the enterprise." Memorandum and Order on Attorney Fees And Final Judgment, January 7, 1985, p. 60. Under the terms of the agreement, the new "financiers" controlled a **[167]** majority of the votes. Upon information and belief, only after

settlement negotiations were completed and the case settled did the Plaintiffs' Management Committee divulge to the Court its internal arrangement.

Upon learning of the agreement, the Court was clearly concerned.

> At the hearing on fees, the court indicated that the then-current internal management agreement was unlikely to withstand close scrutiny. Members of the PMC subsequently entered into a new arrangement permitting reimbursement of moneys advanced by a multiple of three and allocation of the rest of the fee awards to those who were awarded them by the court.

Memorandum and Order on Attorney Fees and Final Judgment, p. 63. As the Court properly noted in its Memorandum "[a] division of fees without regard to work performed or responsibility assumed is not 'in compliance with the standard' for fixing fees. *Prandini v. National Tea Co.*, 557 F.2d 1015, 1019 (3rd Cir. 1979). The 'touchstone for the fee [is] to be the actual effort made by the attorney to benefit the class.' *Grinnell II*, 560 F.2d at 1099." *Id.*, at 61 (parenthetical in original). *See also*, ABA Model Rules of Professional Conduct, Code DR 5-103(A).

By May 7, 1984, the day of trial, five (5) of the nine (9) members (a majority) had contributed $200,000 each to the Plaintiffs' Management Committee. Each of the five (5) stood to make $600,000 from a settlement on May 7, 1984. On that date, **[168]** the five (5) financiers' 300% return on investment was without risk. Interestingly, each of the five (5), financiers became involved in the litigation only six months before settlement.

Mr. Musslewhite's Statement Under Oath appears to indicate that an ability of a majority of the Plaintiff's Management Committee to obtain a 300% return on their investment and receive a share of fees for work performed by

others had an adverse impact on settlement negotiations. Mr. Musslewhite has stated under oath:

> I can tell you from statements made to me by Schwartz, he wanted to take the money and run because Newton is always that way. That is one reason I had difficulty sometimes in dealing with Newton in that is the way he is. He doesn't care whether you try a case and win or what. As soon as he thinks a settlement is reasonable and his estimate of what is reasonable is so far below mine, they don't even come close. So Newton is a settling lawyer. He doesn't like to try cases and he doesn't try any cases to speak of. He just settles and runs. (pp. 100-101)
>
> * * *
>
> And I guess if you are asking me: Did the fact that the money situation enter into it, I would say this, John [O'Quinn] has indicated that certainly anybody that says money consideration doesn't enter into a settlement in negotiations would be a liar. So I suppose to some extent it did influence him. But by nature he is not afraid to go try a lawsuit . . . (p. 101).
>
> * * *
>
> **[169]** Now, the others, based on statements made around me, I don't think there is any question but that money considerations entered into it. (p. 102).

Mr. Musslewhite's statements under oath clearly suggest that the Plaintiffs' Management Committees' internal expense reimbursement and fee sharing arrangement adversely affected settlement. Even if the agreement had no effect on the settlement, the appearance of impropriety is so great as to require the Court to vitiate the settlement.

In his statement, Mr. Musslewhite makes known that Stanley Chesley, Gene Locks and Thomas Henderson had no individual clients (p. 99). Newton Schwartz and Robert

O'Quinn only obtained clients or, more appropriately, obtained an interest in the recoveries of certain clients through an agreement to provide financing to Mr. Musslewhite (p. 99). Once Messrs. Chesley, Locks, O'Quinn, Schwartz and Henderson became members of the Plaintiffs' Management Committee and were appointed as class counsel, they had a fiduciary duty to all members of the class. The absence of individual clients was thereafter of no legal consequence. Nonetheless, a lack of individual clients may have adversely affected Mr. Chesley's ability to adequately represent the class in settlement negotiations, with which he was principally charged." In the absence of previously representing individual Vietnam Veterans, their spouses and children, in the absence of experiencing first hand the egregious injuries nobly suffered by those clients, the class members and their injuries may have been mere abstractions **[170]** to Mr. Chesley. Clearly, zealous representation is fostered by a desire to remedy an injustice to persons known by name, face, and who are known to have suffered severe and unjust injury. Stanley Chesley's lack of individual clients before becoming class counsel may have had a detrimental impact on his ability to represent the class during settlement negotiations.

Indeed, Mr. Chesley indicated that he could not try the case because of his active involvement in the Bendectin litigation (p. 65). Mr. Chesley was far too removed from the Vietnam Veterans, their families and *their* litigation to have been chosen to engage in settlement negotiations.

Mr. Musslewhite's statement under oath further indicates that Mr. Chesley's involvement in the Bendectin litigation may also have resulted in Mr. Chesley failing to adequately inform himself of the strengths and weaknesses of the class representatives' cases for the purpose of settlement negotiations (p. 74-77). Like Agent Orange, the Bendectin litigation is a major MDL/class action. Mr. Chesley played a leading role in bringing about a settlement in that litigation which was ultimately overturned on appeal. Like the Agent

Orange litigation, preparation to try the Bendectin case was a 24 hour job. Query, whether Mr. Chesley had sufficient time to prepare the Bendectin case for trial and adequately inform himself of the strengths and weaknesses of the class representatives' cases in the Agent orange litigation.

[171] The agreement making Mr. Chesley a member of the Plaintiffs' Management Committee is dated December 7, 1983 --- only five months before trial was set. Prior to Mr. Chesley becoming a member of the Plaintiffs' Management Committee, over three (3) years of pretrial proceedings and discovery had occurred. There was clearly insufficient time for Mr. Chesley to acquaint himself with that discovery and those proceedings. Indeed, Mr. Musslewhite's statement under oath indicates that it may have been impossible for Mr. Chesley to inform himself of past discovery. According to Mr. Musslewhite, half of the depositions taken in the litigation remained unsynopsized (p. 50). Finally, evidence supporting the inference in Mr. Musslewhite's statement that Mr. Chesley failed to fully inform himself of the strengths and weaknesses of the class representatives' cases is found in Mr. Musslewhite's statement that Mr. Chesley never sat down with him to discuss the strengths and weaknesses of the government contract defense (pp. 76-78).

Mr. Musslewhite was chiefly in charge of defeating the government contract defense at trial. Had Mr. Chesley discussed the defense with Mr. Musslewhite, he would have assured Mr. Chesley that the defense posed little obstacle to a favorable jury verdict (p. 106, 110). Query whether Mr. Chesley negotiated under a misapprehension as to the strength of that defense. To the extent the spectre of that defense was relied upon at the fairness hearings to justify a clearly inadequate settlement, the possibility of a misapprehension on the part of Mr. Chesley is not remote. *See*, Fairness Hearings.

[172] In addition to inadequately informing himself of the strengths and weaknesses of the class representatives'

cases, Mr. Musslewhite has alleged under oath that Mr. Chesley failed to adequately inform himself and then the Plaintiffs' Management Committee of the number and kind of potential claims against any settlement fund (pp. 66-74). *See also*, Exhibit 10, First Supplement To, and Brief In Support of, Motion Filed Under Rule 59 and 60 of F.R.C.P. Concerning The Courts Final Judgment Dated January 7, 1985, pp. 31-35. Mr. Musslewhite has stated under oath:

> Stan Chesley was given the responsibility of ascertaining the number of cases out there . . . (p. 68).
>
> * * *
>
> But to start off with what made settlement so difficult is that the judges had so framed the case over the history of it that nobody knew what was going on as far as the numbers were concerned. (p. 69).
>
> * * *
>
> As I understood it, Judge Pratt was going to conduct the Government's contractors defense trial, then the general liability trial, and the causation trial if the plaintiffs were successful all along that line. (*Id.*)
>
> * * *
>
> So we come up and we are talking settlement in May of 1984 and we don't really have any detailed medical information about any of the clients but Chesley was given the job of finding out the best he could about the numbers. (p. 70).
>
> * * *
>
> Now he came back to us in that week when we finally got him pinned down to talk with us about it. I am not saying he was evasive but he always played this thing close to his vest. He always said: 'It's a big secret. I can't tell you much.'

[173] I didn't know what was going on. We were kept in the dark, frankly until the last week before the settlement.

And he says that 'The best I can tell is there are 20,000 claims out there and about 3 to 4,000 of them are serious.'

And he assured me and I got the impression he had been checking with everybody. I felt sure he had checked with you, Rob and I understand now from you that he had not checked with you about your claims. I felt certain that he had checked with Yannacone who we all knew had a large number of claims and I hear from Victor today -- in fact I heard since the settlement that he had not checked with Victor on the number of claims except for those two conversations that Tom Henderson had had with Victor which was certainly not down to detail. I understood from many other lawyers around the country, particularly regional counsel, that Chesley did not ever call them. Now, who he called, I don't know. I would like to be able to look him in the eye and ask him the question: 'Who did you call and how did you come up with only 20,000 claims of which some of those would be not serious claims, and about only three or four thousand of them would be serious claims?' He was given that responsibility and that's what he reported back to us. (p. 72).

* * *

But the point I am trying to make is, Rob, at the time we were sitting there and started that around-the-clock negotiation on the fatal weekend before May 7, nobody really knew what the real numbers were. Nobody really knew what the true medical information was on the claim and the kinds of claims and the categories of illnesses or maladies.

> The only information we had is what Stan Chesley told us what the best he could do for us was 20,000 claims with 3 to 4,000 of them serious. (pp. 73-74).

Apparently, Mr. Chesley failed in the responsibility he assumed to determine the number of potential claims which might be filed against any settlement fund. Two examples attest to this failure: Mr. Chesley did not check with Mr. Yannacone, who **[174]** represented approximately 8,000 Vietnam Veterans to determine the number and nature of those claims and Mr. Chesley did not check with Robert A. Taylor, Jr. to determine the number or nature of the claims by the 1,000 Vietnam Veterans he represented. *See*, Exhibit 1, Affidavit of Robert A. Taylor, Jr. Had Mr. Chesley checked with Mr. Yannacone or Mr. Taylor, he clearly would have know that there were far more than 20,000 potential claims and that far more than 3,000 to 4,000 serious cases existed.

As of February 28, 1985, the Agent Orange Computer Center had counted 216,000 timely claim forms. Another 5,000 timely forms are expected. In the 214,000 claim forms analyzed, 9,704 cancers, 35,995 miscarriages and stillbirths and 65,037 families with one or more children with birth defects were identified. No figures were available for the number of wrongful death claims, the liver dysfunctions, renal dysfunctions, central and peripheral neuropathies, gastro-intestinal disorders, immune deficiencies and related problems, chloracnes and the psychosomatic problems, to name only a few of the maladies caused by exposure to Agent Orange. Obviously the 216,000+ claim forms received as of February 20, 1985 does not take into account the claim forms to be filed over the next twenty-five (25) years by those who manifest injury after February 2, 1985. They too are entitled to compensation from the settlement fund.

Indeed, it is questionable whether those charged with negotiations had the opportunity to assess the number of claims that might be made over the next twenty-five (25)

years. As discussed, *infra*, the class definition was altered in the settlement agreement *during* settlement negotiations to include **[175]** for the first time those who had not manifested injury. Undoubtedly, those engaged in settlement discussions had no opportunity to consult biostatisticians to determine what might be the expected rate of various diseases in the future given present rates of appearance.

Without an accurate assessment of the number and nature of present and future claims, the Plaintiffs' Management Committee could not have adequately represented the interests of the class. The failure to take steps necessary to make an accurate assessment of the number and nature of present and future claims is fatal to the settlement. The Court may not approve a class action settlement if representation has been inadequate.

Mr. Musslewhite's statement under oath attests to further serious inadequacies of representation. According to Mr. Musslewhite, the Plaintiffs' Management Committee failed to computerize the documents and depositions (pp. 49-52). Indeed, Mr. Musslewhite has stated under oath that on the day of trial only one-half of over 200 depositions had been synopsized (pp. 50, 55). A review of defendants' Proposed Pretrial Orders in conjunction with a list of depositions taken brings to light that on the day trial was to have begun, only 26 of the 81 live medical causation witnesses to be called by the defendants had been deposed. In total, defendants listed 160 live causation witnesses they intended to call at trial. In separate proposed pretrial orders, defendants were to list their live liability witnesses. Settlement removed that obligation. It is unknown how many of defendants' liability witnesses were not deposed.

[176] According the Mr. Musslewhite, documents remained unorganized for purposes of preparing 26(b) statements and, inferentially, for trial. Eight of plaintiffs' 14 liability witnesses were excluded as a result of Mr. Musslewhite's failure to submit complete 26(b) statements (p.

41). According to Musslewhite, he was unable to submit full 26(b) statements because he could not obtain necessary documents from other members of the Plaintiffs' Management Committee (p. 40). Apparently, the documents were unorganized or had not been culled to make them available for 26(b) statements and trial. A call for help may also have indicated a lack of preparations to go to trial.

Ashcraft & Gerel received a call from a member of the Plaintiffs' Management Committee three weeks before the May 7, 1984 trial date, asking the firm to assign Robert A. Taylor, Jr. to work full-time on the Government Contract Defense and requesting partners James Green and Robert Adams to devote as much time as was possible to defeat that defense at the upcoming trial. Though Ashcraft & Gerel had withdrawn from the Plaintiffs' Management Committee in September of 1983, the request seemed urgent enough, and troubling enough in light of the doctrine of *stare decisis*, to cause the firm to begin a shifting of responsibilities to provide the requested aid. Settlement, of course, terminated those activities.

Apparently, the call for help was made by Mr. Musslewhite without authorization by the Plaintiffs' Management Committee. When he advised them of his request, the Plaintiffs' Management Committee voted him down. Why the Plaintiffs' Management **[177]** Committee refused sorely needed help is unclear. Was it a fear that Ashcraft & Gerel would learn the level of preparation to go to trial (p. 46)? The very fact of the call raises a question as to the level of preparedness of the Plaintiffs' Management Committee. Indeed, the extremely low settlement figure raises this same question.

According to Mr. Musslewhite, frantic efforts to prepare for trial exhausted the members of the Plaintiffs' Management Committee (pp. 46-47, 62-64). To be then forced by the Court into a marathon settlement negotiation on

the eve of trial clearly diminished the effective representation of the class. According to Mr. Musslewhite:

> This tactic of Judge Weinstein's had a profound effect on everybody. It really did.
>
> Not only were you tired and not your usual self in terms of resistance of having control, you know, of what was going on but it made you feel kind of helplessness.
>
> * * *
>
> And the Time article or the Newsweek article that commented that the Judge wore us all down with that tactic, that was a very true statement. He did.
>
> Q. Were you engaging in settlement negotiations under - -
>
> A. Duress? Pressure? [Mr. Musslewhite suggesting the right word].

Exhibit 22, pp. 79-81. In addition to wearing down counsel through around-the-clock negotiations, Mr. Musslewhite further suggests that the Court unduly made its intentions known to direct a verdict and to only allow select diseases to go to the **[178]** jury (pp. 83-87). Finally, Mr. Musslewhite's statement under oath indicates that the Plaintiffs' Management Committee was negotiating under two additional misconceptions: 1) that wives and children would receive awards from the settlement fund, regardless of the Court's belief as to a lack of causation evidence (pp. 88-89); and 2) that the settlement fund might be augmented by suit against the government (pp. 90-91). As is now known, the proposed distribution plan disenfranchises the wives and children from any cash awards and the government has been granted summary judgment on the wives' and veterans'

claims.[117] When the above two misassumptions are combined with the alleged failure of the Plaintiffs' Management Committee to take adequate steps to ascertain the number and nature of present and future claims,[118] serious questions as to the adequacy of class counsel's representation are raised. When serious questions as to the adequacy of class counsels' representation are raised, the Court must set aside the settlement.

A large number of serious questions have now been raised. Did Yannacone & Associates refuse to develop proof of causation from September 1979 to May 1983? Statement under oath by Victor Yannacone, Jr., Exhibit 21, pp. 22, 34, 61. Did the Consortium under-staff the litigation? Id., at 31, 39, 42, 54-55, 57. Did **[179]** the Consortium refuse to purchase documents produced by the government? When microfilmed copies of the government's documents were finally purchased, did members of Yannacone & Associates refuse to review them until shortly before the motions for summary judgment? *Id.* at 34-35. Was a single microfilm reviewer sufficient on which to review all the microfilm? *Id.* Did members of the Consortium refuse to review documents produced by the chemical companies until forced by the motions for summary judgment? *Id.* at 35. Did members of the Consortium ignore Mr. Yannacone's repeated requests for aid in reviewing the documents produced by the government and the chemical companies? *Id.* at 37. Was more than one high speed copier needed? *Id.* Did the frequent interdiction of computer services for non-payment harm the litigation?

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[117] By order of February 8, 1985, the Court dismissed the children's claims without prejudice to future suit.

[118] Victor Yannacone has stated under oath that Yannacone & Associates and the Plaintiffs' Management Committee willfully failed to determine the number and nature of claims for fear that a large number of serious claims would make a settlement difficult to achieve. See, Exhibit 21, pp. 83-83.

Id. at 40. Did a lack of significant word processing harm the litigation? *Id.* at 40-41. Did the failure to place any discovery documents on whatever computer existed adversely affect the case? *Id.* at 41-42. Did the members of Yannacone & Associates lack the experience necessary to prepare and try the Agent Orange case? *Id.* at 43. Did the failure to retain consulting experts impair the preparation of the case? *Id.* at 43-44. Did Yannacone & Associates under-fund the case and, if so, did that adversely impact upon preparation and settlement. *Id.* at 44-51. Is the large number of unpaid bills indicative of a failure to adequately fund the litigation and did the failure to pay bills interrupt vital services, e.g., provision of deposition transcripts? *Id.* at 51-53. Did members of Yannacone & Associates fail to review deposition transcripts? *Id.* at 54. Out of approximately 200 depositions, why were more than 10 but **[180]** less than 50 put into the computer? *Id.* at 57-58, 65. Why were most of the depositions taken by defendants. *Id.* at 58-59. Was a decision actually made largely on the basis of costs that no depositions would be taken until after defendants finished all their depositions. *Id.* at p. 59. Did members of the Consortium fail to vest sufficient time to master documents relevant to the government contract defense? *Id.* at 61. Why did Yannacone & Associates fail to cross move for summary judgment on elements one and two of the government contract defense? *Id.* at 65. Did the bitter feuding between the two factions of Yannacone & Associates harm the litigation? Musslewhite Statement, Exhibit 22, pp. 14-15. Why were plaintiffs' counsel asking no questions at depositions and failing to cover elements one and two of the government contract defense. *Id.* at 16. Why was a partial summary judgment granted against plaintiffs on elements one and two of the government contract defense? *Id.* at 17-19. Was it proper to have on the Plaintiffs' Management Committee lawyers who had never represented individual clients? *Id.* at 24. What effect did an absence of individual clients have on the ability of certain members of the

Plaintiffs' Management Committee to represent the class? Why was Peter Johnson's firm not brought into the Plaintiffs' Management Committee and what effect did that have on the litigation? *Id.* at 29-31. Why did the Plaintiffs' Management Committee fail to adequately use the manpower and expertise of members of Yannacone & Associates? *Id.* at 33-34. Why had nothing been done by members of the Plaintiffs' Management Committee to obtain liability witnesses until after December 1983/January 1984. *Id.* at 35-36. Why had **[181]** other members of the Plaintiffs' Management Committee been unable to provide discovery documents necessary to prepare the liability experts and their 26(b) statements? *Id.* at 37. Were eight (8) of fourteen (14) of plaintiffs' liability witnesses excluded because of a failure to submit adequate 26(b) statements? *Id.* at 40-41. What impact did that have on the settlement negotiations? Why did the Court exclude "rational decision makers" within the United States Government from testifying? *Id.* at 42-44. When the Plaintiffs' Management Committee could not use high level witnesses to establish that the government did not have equal or greater knowledge concerning the hazards of Agent Orange, was the Plaintiffs' Management Committee prepared and able to match defendants' lower eschelon witnesses? *Id.* at 44-46, 53-55. Why was Ashcraft & Gerel importuned by Benton Musslewhite to aid him with the government contract defense a few weeks before trial? *Id.* at 44-46. Why was the pretrial statement inadequate and poorly organized? *Id.* at 47-49. Was the plaintiffs' case in an administrative shambles? *Id.* at 49. Why had no computerization of depositions occurred? *Id.* at 49-50. Why were only one-half of all the depositions synopsized in the absence of computerization? *Id.* at 50-51. Did the Plaintiffs' Management Committee unwisely expend its finances by failing to spend on priority items, e.g., computerization and getting all the depositions and documents summarized? *Id.* at 51-52. Did the Plaintiffs' Management Committee overly simplify the cases and, hence, fail to develop appropriate

witnesses? *Id.* at 58. Did personality clashes have a detrimental affect on the litigation? **[182]** *Id.* at 26-29, 60-63. Did Stan Chesley's heavy involvement in the Bendectin litigation have an adverse impact on his ability to prepare for settlement negotiations? *Id.* at 65-66, 74-77. Why were other members of the Plaintiffs' Management Committee not advised of the negotiation level until it had reached a shockingly low $250,000,000? *Id.* at 67-68. Did the Plaintiffs' Management Committee fail to inform itself as to the number and nature of potential claims as a basis for negotiating? *Id.* at 66-74. Did the Plaintiffs' Management Committee purposely fail to determine the number and nature of potential claims against any settlement fund for fear of uncovering such a numerous number of serious claims that settlement would have been made extremely difficult (Victor Yannacone Statement, pp. 83-85). Did the chief negotiator for the plaintiffs ever take the time to fully apprise himself of the strengths and weaknesses of the class representatives' cases (Musslewhite Statement, p. 77.) Given the voluminous amount of discovery which preceded his membership on the Plaintiffs' Management Committee, was it physically possible for the Committee's chief negotiator to digest that discovery in five months to prepare for settlement negotiations? *Id.* at 76-77. Were the members of the Plaintiffs' Management Committee negotiating under conditions of exhaustion? *Id.* at 79-81. Were the members of the Plaintiffs' Management Committee negotiating under duress? *Id.* at 80-81, 87. Did the Court put inappropriate pressure on the plaintiffs negotiators? *Id.* at 81-86. Did an absence of knowledge as to the number and nature of potential claims against the settlement fund adversely affect the settlement? *Id.* at 82-83, 88. Did the Plaintiffs' Management Committee rely to their detriment on **[183]** the Court's statements that by being part of the class, the wives and children would get something? *Id.* at 88-89. Did the Plaintiffs' Management Committee miscalculate that they would have a chance to augment the settlement fund through

suit against the government? *Id.* at 90-93. Were the class action representatives, apprised of the course of negotiations? *Id.* at 94. What effect did an absence of personal clients have on the ability of four members of the Plaintiffs' Management Committee to zealously represent the class? *Id.* at 95, 99. Did the Plaintiffs' Management Committee's chief negotiator or his firm represent Lloyd's of London during the Agent Orange settlement negotiations? *Id.* at 95-98. Did a conflict of interest or an appearance of impropriety exist if Mr. Chesley or his firm represented Lloyd's of London? *Id.* at 95-98. Did the Plaintiffs' Management Committee's internal fee sharing and expense reimbursement agreement, whereby the "financiers" were entitled to three (3) times the amount of money they contributed and to share in the fee awards of others for work the "financiers" had not performed, have an adverse impact on the settlement negotiations? *Id.* at 99-105?

Answers to many of the above questions have been provided by the statements under oath by two former members of the Plaintiffs' Management Committee. *See*, Exhibits 21 and 22. Their answers only raise more questions. The questions which have arisen are alone sufficient for the Court to reconsider its approval of the settlement. At the very least, the Court should allow objectors to the settlement to conduct discovery and establish a record as to the unfairness, unreasonableness and inadequacy of the settlement.

[184] Ashcraft & Gerel renews its motion to have a subclass of objectors certified and to appoint Ashcraft & Gerel as counsel to the subclass for the purpose of conducting discovery as to the reasonableness, fairness and adequacy of the settlement. The Court has a "continuing duty to undertake a stringent examination of the adequacy of representation by the named class representatives and their counsel at all stages of the litigation (citations omitted)" *In Re General Motors Corp. Enqine Interchange Litigation*, 594 F.2d 1106, 1124 (7th Cir. 1979). Discovery by counsel

representing objectors to the settlement would aid the Court in carrying out that duty.

C. Serious Defects in the Class Action Call For The Settlement to Be Set Aside

1. The Class Definition Is Imprecise

The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is feasible for the court to determine whether a particular individual is a member. The class definition must not be amorphous or imprecise. Consequently, whether a person is a member of a class may not depend on his state of mind or subjective belief. *Ihrke v. Northern States Power Company,* 459 F.2d 566, 573 (8th Cir. 1972); *Jimeniz v. Weinberger,* 523 F.2d 689, 698 (7th Cir. 1975); *cf., In Re Agent Orange Product Liability Litigation,* 100 F.R.D. 718, 728-29 (2nd Cir. 1983). The definition of the class in this case, requires the Court to ascertain a person's state of mind to determine whether that **[185]** person is a class member. The court has to determine whether a person believes that Agent Orange caused his or her injuries.

The Clerk of Court's letter which prefaces the March 19, 1984 Legal Notice To Class Members of Pendancy of Class Action stated: "This lawsuit is a class action on behalf of persons . . . who allege injury." The class also includes spouses, parents and children . . . who *claim* direct or derivative injury . . . (Emphasis added). The actual notice stated:

> 2. The plaintiffs include spouses, parents, and children born before January 1, 1984, of the service persons who *claim* direct or derivative injury as a result of exposure.

In Re Agent Orange Product Liability Litigation, 100 F.R.D. at 731-32 (emphasis added). Similarly, the radio and television notice was styled to catch the attention of those who "claim injury." *Id.* at 734. The newspaper and

magazine notice highlights the state of mind problem. That notice stated:

> If you or anyone in your family *can claim* injury, illness, disease, death or birth defect as a result of exposure to Agent Orange. . .

Id., at 734-35.

Whether one claims (believes) or can claim (capable of believing) that his or her direct or derivative injuries resulted from exposure to Agent Orange is a state of mind. To determine whether one claimed or could have claimed injury as a result of Agent Orange at or before final judgment requires the ascertainment of the person's state of mind. The class definition, hence, is impermissibly imprecise.

[186] 2. The Class Definition Was Improperly Altered After Notice Had Been Sent To the Original Class Members

The class was originally defined in the March 9, 1984 Legal Notice To Class Members of the Pendency of a Class Action as set out in the proceeding section. After the notice had been sent, the Court accepted a settlement agreement which altered the class definition. The altered definition brought into the class for the first time persons who had not manifested injury and children born after January 1, 1984. Page 9 paragraph 8 of the settlement agreement states: "The Class specifically includes persons who have not manifested injury." The original notice failed to advise the original "claiming injury" class members that "noninjury claiming" members and children born after January 1, 1984 would be added to the class. Having permitted such an alteration, the Court failed to provide proper notice, a renewed opportunity to opt-out and to assure that the settlement fund fairly and adequately provided for the new claims. *Weinberger v. Kendrick,* 698 F.2d 61, 70, 77 (2nd Cir. 1982).

3. Notice Was Not The Best Notice Practical Under The Circumstances Including Individual Notice To All Members Who Could Have Been Identified

Through A Reasonable Effort

The fourteenth Amendment guarantees all class members due process of law. An opportunity to be heard is a fundamental **[187]** requisite of due process of law. "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane, Special Guardian v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). Consequently, a notice informing absent class members of the pendency of a class action must be reasonably calculated, under all the circumstances, to apprise them of the pendency of the class action and permit them sufficient time to respond. *Id.*

> The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . .(citations omitted) or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Mullane, 339 U.S. at 306. Under the teachings of *Mullane*, written actual notice must be sent to all class members known to the class representatives and to those who can be identified "with due diligence." *Id.* at 317. *Mullane* also suggests that publication notice may be utilized for class members who cannot be identified through a reasonable effort if it is of a "form ...not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Mullane*, at 306. The Supreme Court has made clear, however, that "'[n]otice by **[188]** publication is a poor and sometimes a hopeless substitute for actual service of notice,' and that '[i]ts justification is difficult at best.'" *Schroeder v. City of New York*, 371 U.S. 208, 213 (1962).

Rule 23 (c) (2) of the Fed. R. of Civ. Pro. codifies these constitutional imperatives.

By its terms, Rule 23(c)(2) is applicable to this 23 (b) (3) class action. Rule 23(c)(2) states

> In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may if he desires enter an appearance through his counsel.

Rule 23(c)(2) of Fed. R. of Civ. Pro. The Supreme Court has declared that subdivision (c) (2) expresses an "unambiguous requirement" that "individual notice must be provided to those class members who are identifiable through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 159, 175-76 (1974). (hereafter *Eisen*). If publication notice is to be utilized for those class members who cannot be identified through a reasonable effort, publication of the notice must be the "best practical under all the circumstances" and "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Rule 23 (c)(2); *Mullane*, 339 U.S. at 315.

[189] As set forth *infra*, the District Court failed to direct and the Plaintiffs' Management Committee failed to give the best notice practical under the circumstances.

a. The Court Failed To Direct And The Class Action Representatives Failed To Undertake An Identification Of Class Members Who Could Have Been Identified Through A Reasonable Effort

Since February 1981, the Court and the class representatives have been aware of eight sources of names and addresses of class members. The sources and the reasonableness of their review as part of the identification process is detailed in an affidavit dated January 29, 1981 by Edwin R. Matthews, Esq., counsel to Thompson Chemical Company. *See*, Exhibit 14, Appendix, Defendants' Memorandum of Law On The Issue of Class Certification, filed November 8, 1983, Docket No. 1517, Tab 4. Briefly, the sources and their usefulness in identifying the names and addresses of class members were:

1. Veterans Administration Computer System (VADS)

   Computerized records capable of identifying Vietnam veterans discharged after 1973

2. DD-214 at 58 Regional VA Hospitals

   Written records of Vietnam Veterans who have active files at the VA hospitals, e.g. veterans who are educationally deprived or suffered impairment as a result of the Vietnam conflict.

3. Veterans Administration's Agent Orange Registry

   A computerized record containing the names and addresses of approximately 89,000 Vietnam veterans (as of February 1984, *see*, Docket No. 1870) who requested Agent Orange medical screening by the VA.

4. National Military Personnel Records

   Written records of most of Army's, Navy's, Air Force's and Marine's separated, discharged and **[190]** retired personnel. The records contain DD-214 forms with names and last known addresses at date of separation, discharge or retirement with some updated addresses (24 persons working for one month could identify practically all Vietnam veterans who served in Vietnam.

5. Active and Reserve Duty Records

   Computerized records maintained at Department of Personnel Centers for the Army, Air Force, Navy and Marine Corps of active duty and reserve personnel (the Air Force, Marine Corps. and Army could generate *current address* list within 30-60 days of active personnel who served in Vietnam. The Marine Corps Center estimated that of approximately 190,000 active duty marines, 50,000 served in Vietnam. The Reserve Record Centers estimated that they could generate between 264,000 and 294,000 names and current addresses at nominal cost, e.g. $500 for the Airforce list and $2,000 for the Navy list.)

6. States and Territories Which Paid Cash Bonuses

   Computerized and noncomputerized records of Vietnam veterans who were paid service bonuses by the states and territories. Illinois, Louisiana, Michigan, Missouri, North Dakota, Pennsylvania, Washington and Wisconsin could provide the names and last known addresses of 600,000 veterans who served in Vietnam.

7. 68 Private Veterans Organizations

   Computerized and uncomputerized membership list containing current names and addresses. For example, 750,000 of the American Legion's 2.7 million members are Vietnam-era veterans (not all may have fought in Vietnam).

8. Organizations Formed Specifically Around the Agent Orange Issue

   Computerized and noncomputerized membership list of vietnam veterans.

Id. Perhaps one million out of the 2.4 million Vietnam Veterans could have been identified from the above sources through a reasonable effort. Of the above sources, only the

Veterans Administration's Agent Orange Registry with its 86,000 names is known to have been used to identify class members.

[191] A review of some or all of the above listed sources for names and addresses was clearly a reasonable effort. The class representatives conceded in the Fourth Amended Verified Complaint that it was possible to identify each class member by reference to records maintained in the ordinary course of operations. *See*, Exhibit 6 to Docket No. 1517. As attested to by Mr. Matthew's affidavit, many of the names and addresses are computerized. *See*, Exhibit 14. Furthermore, as a party, the government could have been ordered to conduct the computerized and manual searches with an entitlement to payment for expenses from the class representatives. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356-59 (1974).

Clearly, the effort to identify the names and last known addresses of class members from some, if not all, of the above sources was a reasonable effort.

> [O]nce a 23(b)(3) action has been certified, the name and *last known address* of each class member known to the parties or capable of being identified from business or public records available to them *must be produced* (note omitted). The source or sources providing the greatest number of names and addresses *must be used*. (emphasis added).

In Re: Nissan Motor Corp. Antitrust Litigation, 552 F.2d at 1088, 1098-1100. As in *Nissan*, this Court should turn to *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) to determine the reasonableness of identifying class members from the sources listed above. In *Eisen*, the Supreme Court upheld a district court's finding that, based upon the parties access to computerized records, the names and addresses of 2.2 million class members could be identified through a reasonable effort. **[192]** *Eisen*, 417 U.S. at 175. Relying on *Eisen* and the dictates of *Mullane* and *Schroeder*, the Court in

Nissan found an admittedly "'herculean task'" of *manually* identifying the names and *last known addresses* of class members from 1.7 million dealer registration cards to be a reasonable effort in light of the size of the class action. The Court stated, "*[A] large class requires a large effort.*" *Nissan* at 1100. (Emphasis added). The Agent Orange class dwarfs the class in *Eisen* and *Nissan*. The effort in identifying class members in the Agent Orange case must dwarf the "herculean task" required in *Nissan*.

The class representatives should have obtained the names and last known addresses of all class members whose identity could have been gleaned from computerized records. Sources 1, 5, 6, 7, and 8 set out above contain computerized records. It was the existence of computerized records which, in part, caused the Supreme Court to decide in *Eisen* that the identification of 2.2 million class members was a reasonable effort.

Computers have not always been with us and the requirement of a manual search does not make the identification effort unreasonable. The Court in *Nissan* required the *manual* search of 1.7 million dealer cards to identify class members. *Nissan* at 1096, 1100. Manual searches would be required of sources 2, 4, 6, 7 and 8 above. Only a search of source 4 comes close to properly being characterized as a "herculean task." As the Matthews' affidavit accurately points out, however, 24 individuals over one months time could complete the task at an estimated cost of $30,000. This is a relatively small sum and the Supreme Court in *Eisen* teaches:

> **[193]** There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.

Eisen, 417 U.S. at 176. In addition to failing to use available computerized military and governmental records to identify class members, the class representatives failed to use even available Court records.

The class representatives should have reviewed the caption of each line complaint in MDL 381 to obtain the names and addresses contained thereon. No affidavit attests to that having been done. The class representatives should have reviewed the motions to intervene in *Dowd v. Dow*, 79 C 479 to obtain the names and addresses contained therein. No affidavit was located in the record attesting to such an effort. The class representatives should have contacted counsel for the class members who had filed complaints and requested the names and addresses of their clients. No affidavit attesting to such an effort was located in the record. Ashcraft & Gerel provided to the PMC the names and addresses of its clients shortly after becoming a member of the PMC in March of 1983. From March of 1983 to April of 1984 when notice issued, the PMC never contacted Ashcraft & Gerel to obtain an updated list. During that time, additional clients retained Ashcraft & Gerel and old clients changed addresses.

The class representatives clearly failed to identify class members who could have been identified through a reasonable effort.

[194] b. The Class Representatives Failed To Provide Written Notice To Some Class Members for Whom They Had A Last Known Address

Even more egregious than failing to obtain from the government machine retrievable names and last known addresses, was the failure to give notice to those whose names and addresses had been furnished to them. For example, the state of Massachusetts sent the class representatives a computer tape containing the names and addresses of 157,496 Vietnam veterans. Letter, Docket No. 2535. The class representatives did not send notice to that group. That fact does not appear of record but was conveyed in a telephone conversation to Robert A. Taylor, Jr., Esq. by Robert Laquori, who headed the computer mailing. *See*,

Exhibit 1. The reason given was the arrival of the tape approximately one week before the opt-out deadline of May 1, 1984. *Id.* A letter from the PMC acknowledging receipt of the computer tapes on April 17, 1984 appears to belie that explanation. *See*, Letter, April 18, 1984, Docket No. 2535.

Similarly, the class representatives failed to provide individual notice to 20,000 West Virginia Vietnam veterans for whom they had addressed labels. The State of West Virginia provided the class representatives 28,000 mailing labels to be used to provide West Virginia's Vietnam veterans with notice of the class action. As explained by Robert Laquori in a letter of July 11, 1984 to Chuck Conroy, West Virginia's Agent Orange Assistance Coordinator, only 8,000 of the 28,000 labels were used. *See*, Exhibit 15. All that had to be done was stuff the envelopes and put on the labels. The fact that it was not done **[195]** is indicative of the absence of a desire on the part of the class representatives to give the best practical notice, *including individual notice to those known* or identifiable through a reasonable effort.

Ms. Jan Levin, an attorney with the PMC advised Robert A. Taylor, Jr., a member of the law firm of Ashcraft & Gerel that only 187,600 written notices were sent. *See*, Exhibit 1. The class is estimated to contain 2.4 million Vietnam veterans, their spouses and children. The class could well be in excess of 5 million members. Ms. Jan Levin further advised Robert A. Taylor, Jr. that out of the 187,600 notices mailed, 57,096 were returned as undelivered or undeliverable. *Id. Roughly one-third of all the written notices mailed were not received by class members.* Two explanations were given by Robert Laquori. First, the program he wrote was not 100% efficient in switching the information in the "fields" on the Agent Orange Registry computer tape to the "fields" on his tape. As he explained, the result was that "some of the addresses looked funny." *Id.* Another tape was sent from the State of Wisconsin with 36,389 names on it. According to Mr. Laquori, he believes the names and addresses were bogus and there was a

"conspiracy." *Id.* 30,603 letters addressed using the Wisconsin computer tape were returned as undelivered or undeliverable.

The experience of the Australian and New Zealand class members is particularly sad and has done little for good relations between the United States and the veterans of those countries. The veterans of Australia and New Zealand did not receive the Legal Notice To Class Members of Pendancy of Class **[196]** Action until shortly before and frequently after the May 1, 1984 opt-out deadline. *See*, Transcript of Fairness Hearings in San Francisco.

Standing alone, the class representatives' failure to give individual written notice to those known to them is fatal to the class action. When that fact is combined with a failure to undertake reasonable efforts to identify class members and such a poor record of mailing notice, there can be no question but that the class action must be decertified.

c. The Written Notice Was Defective

Even if the written notice reached a class member, the notice itself was defective. The written notice failed to identify the representative plaintiffs. Representative parties are normally identified in a class action notice. *Newberg on Class Actions* § 24.75, p. 147. Identification of the representatives allows the class members to determine whether their particular situation is represented and their interests therefor protected. In this case, the plaintiffs asserting survival and wrongful death claims and those who had not manifested injury had no class representatives and were not advised of that fact. The lack of representation permitted their claims to be compromised. *See*, *supra*.

The absence of an identification of the class representatives and a lack of specification as to the extent of their representation also caused plaintiffs' counsel great difficulty in advising their clients. *See*, Exhibit 16. Letter from Ronald L. Wolf, Esq. to Honorable Jack B. Weinstein dated **[197]** March 23, 1984, Docket No. 2299. Counsel

could not advise their clients whether their interests were protected by any of the class action representatives.

The notice failed to advise certain types of class members how to opt-out. The notice failed to advise spouses and children of the need to sign separate "Exclusion Request Forms." Perhaps for that reason an estimated 80% of the "Exclusion Request Forms" are signed only by the veterans and not by the spouses and children. While there may be some exceptions, the norm of family life suggests that members of a family prefer to stay together in a lawsuit. The absence of instructions has frustrated that desire. The Court has ruled that the filing of an "Exclusion Request Form" by a Veteran is insufficient to opt his or her spouse or children out of the class action.

d. Publication Notice Did Not Cure The Defects in Written Notice

The defects in sending or in failing to send written notice cannot be cured. The Supreme Court has declared that subdivision (c)(2).expresses an "unambiguous requirement" that "individual notice must be provided to those class members who are identifiable through reasonable effort." *Eisen*, 417 U.S. at 175-76. Publication notice may not be used as a substitute when class members are identifiable through a reasonable effort. When used to provide notice to chose who cannot be identified through a reasonable effort, publication notice must be the "best practical under all the circumstances" and "such as one **[198]** desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

Requesting *proprietary* radio and television stations to broadcast the notice as a public service is not the "best practical notice under the circumstances" and clearly is not "such as one desirous of actually informing an absentee might reasonably adopt to accomplish it." According to Ms. Jan Levin, only 70 radio stations in the whole country and *not a single television station* advised the PMC, in

accordance with the Court's request, that the station had broadcast the notice. *See*, Exhibit 1, *see also*, 100 F.R.D. at 730. Clearly, the maxim that one gets what one pays for is applicable here. One desirous of actually informing those who could not be identified through a reasonable effort would have paid for air time. That clearly would have been the best practical notice under the circumstances.

Nor is the publication of an abbreviated notice in the letters section of the *April 30, 1984* edition of Time Magazine the best notice under the circumstances and such as a person desirous of actually informing an absentee might reasonably adopt. A copy of the Time notice is found as Exhibit 17. A class member could have obtained a copy of the April 30, 1984 Time magazine from the stands as early as April 33, 1984. More than likely, he or she would have received the magazine by mail at home shortly before or after May 1, 1984. The deadline for opting out of the class action was May 1, 1984. The notice was abbreviated and required a class member to call an 800 number to obtain through the mail a complete notice. As can be seen from **[199]** the April 4, 1984 letter of Keith D. Snyder, the 800 service had its bad days. *See*, Exhibit 18. If an absentee had seen the Time Magazine notice on April 23, 1984, the earliest day on which it could have been obtained, and immediately called the 800 number, he would have gotten the written notice on *May 23,* 1984, advising him of his right to opt out by *May 1, 1984.* Perhaps most egregious was placing the notice in the letters to the editor section instead of on the sports page; perhaps counsel for those who wished to opt-out would not have then missed the notice.

The Court required notice to be published in only two major newspapers: The New York Times and U.S.A. Today. *In Re Agent Orange Product Liability Litigation,* 100 F.R.D. at 730. Publication of an abbreviated notice in The New York Times and in U.S.A Today is also not the best notice under the circumstances and clearly not such notice as a person desirous of informing an absentee in Peoria, Illinois

would choose. According to official 1980 census figures, Peoria Illinois has 365,864 people in its "standard metropolitan statistical area." *See*, Census of Population, 1980: Illinois; "Characteristics of Inhabitants: Illinois" Table 11, p. 15-50 and "General Population Character, Illinois," p. 15-5. As can be seen from the affidavit found as Exhibit 19, "241 Sunday editions of The New York 'Times are regularly sold in the Peoria, Illinois metropolitan area and 127 daily editions of The New York Times are regularly sold in the Peoria, Illinois metropolitan area." For the purposes of providing notice, U.S.A. Today's circulation is little better. According to the affidavit found as Exhibit **[200]** 20, U.S.A. Today sells on the average 1450 papers a day. Peoria, Illinois is a major metropolitan area. How many New York Times and U.S.A. Todays are sold in Mount Storm West Virginia?

As the hearing on February 6, 1985, Thomas Henderson, a member of the PMC, admitted that class certification notice had been inadequate. Hearing before the Honorable Jack B. Weinstein, February 6, 1985, Tr., pp. 44-45. More importantly, he admitted that the PMC's failure to give adequate notice was one of the reasons why the case was settled for an inadequate sum. *Id.* Those admissions raise serious questions as to the propriety of the settlement. Query, how can class action counsel, who have a fiduciary duty to class members, use their malfeasance as a ground for accepting an inadequate settlement? If the PMC knew that it was incapable of providing constitutional notice, the PMC had a fiduciary responsibility to the class members to request that the class action be decertified. A failure to give adequate notice could not be allowed to adversely affect settlement negotiations, which, according to Mr. Henderson, it clearly did. If the Court knew that class certification notice had been inadequate, it had an absolute duty to require adequate notice or decertify the class action. *Eisen.*

The class action representatives clearly failed to give the best practical notice under the circumstances, including

written notice to those class members who could have been identified through a reasonable effort. Having failed to give constitutionally mandated notice, the class representatives used **[201]** that failure to justify the acceptance of a clearly inadequate, unreasonable and unfair settlement. The Court must decertify the class action and reject the tainted settlement.

4. The Court Had No Jurisdiction Over The Class Action

The class action was based on diversity of citizenship pursuant to 28 U.S.C. § 1332. *In Re Agent Orange Product Liability Litigation,* 635 F.2d 987, 993, *cert. denied,* 454 U.S. 1128 (1981); *cf., In re Diamond Shamrock Chemicals Co.,* 725 F.2d 858, 861 n.2 (2nd Cir. 1984). In a class action based on diversity of citizenship, each member of the class must have a colorable claim of $10,000.00 exclusive of costs and interest. *Zahn v. International Paper Co.,* 414 U.S. 291 (1973). Those class members who have not manifested injury clearly have no colorable claim of at least $10,000.00 in controversy exclusive of costs and interest. The Court is without subject matter jurisdiction.

Under *Snyder v. Harris,* 394 U.S. 332 (1968) and *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356 (1921), complete diversity must exist between the class representatives and the defendants. The Dow Chemical Company has it principal place of business and is incorporated in Midland, Michigan. Danny and Christine Ford, two of the class action representatives were residents of Michigan when the action was filed. In the absence of complete diversity, the Court is without subject matter jurisdiction.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re "AGENT ORANGE" Product Liability Litgation

MDL No. 381
All (Cases)

United States Courthouse
Brooklyn, New York

March 18, 1985
10:00 o'clock a.m.

Before:
HONORABLE JACK B. WEINSTEIN, Chief U.S.D.J.

[Transcript Excerpts]

* * * *

[5] THE COURT: First motion of the defendants to disqualify Ashcraft and Gerel from further representation of any plaintiff in the Agent Orange litigation. I will hear you.

MR. RIVKIN: Your Honor, on behalf of all the defendants, I would urge the motion. It appears without opposition, the facts are the firm of Ashcraft and Gerel represents plaintiffs who have opted out and represents plaintiffs who are taking. They have made a motion to set aside the settlement and they are appealing various items pertaining to the settlement class action.

I submit, sir, I cannot serve two masters. A win on the part of Ashcraft and Gerel on behalf of objecting clients by necessity translates into a loss for their client class members who favor the settlement.

I really do not care to argue it in any depth, because the law is clear, the facts are uncontested, and I would submit they'd have to pull out.

THE COURT: Any response?

MR. MANSULA: I will be speaking only for this limited motion. My name is Wayne Michael Mansula of the law firm of Ashcraft and Gerel. Can I speak from my seat?

THE COURT: Yes, wherever you are comfortable.

MR. MANSULA: Your Honor, I do not feel this motion is --

[6] THE COURT: Excuse me a moment.

(Pause.)

Yes.

MR. MANSULA: I feel the defendants lack standing to make this motion here. This is not the proper forum. But to go the substance, your Honor, I do not believe they have even profited any information about our clients to state whether or not there is a conflict or not.

I can represent to the Court there is no conflict. All our clients are against the settlement at this time. In fact, I do not know of many veterans that are for the settlement.

As far as our veterans are concerned, your Honor, we do not have any. We informed them at the time -- in the early stages when the settlement was first announced -- we had a miniscule number, 3 or 4, that were saying, "protect the settlement," but those have long since changed their minds. We informed them that they had a right to seek out other counsel, because there may be a conflict, but they chose to fight the settlement and not seek counsel. At this time there is no conflict and has not been for many, many, many months.

[7] If you use the defendants argument about the conflict in this whole litigation, because the Plaintiffs Management Committee had been representing different interests and different rights, so as far as our law firm is concerned, we have no clients that are supporting the settlement at this time.

THE COURT: There is clearly a solid basis for the motion. Under the Second Circuit decisions, were there just

a few clients being represented by this law firm, it is clear that the law firm would be disqualified for a conflict of interest. There are many conflicts as related in the defendants papers.

One of the factors that gave the Court pause, when Ashcraft and Gerel asked for attorneys fees in connection with the class action, was based on this conflict where Ashcraft and Gerel took the position that they were not going to support the settlement, they were going to advise the clients to oppose the settlement, and yet they wanted a substantial amount of funds from the settlement.

The Court gave a fee, although it has great reservations about it, and that matter should be taken up by the Second Circuit.

The practical problem here is that were Ashcraft and Gerel disqualified, it is unlikely that any responsible lawyer would undertake the representation **[8]** of these plaintiffs. Ashcraft and Gerel must make a very substantial investment in the case, both for the appeals that are pending, in connection with the motions and other litigation that is going forward. In effect, they have gotten on a tiger that they cannot dismount. It is unlikely that any other reputable attorney would get on that tiger, given the circumstances of this case. So that if the motions were granted, the net effect would be that these plaintiffs would be unrepresented. It seems to me that the second circuit's position with respect to disqualification of attorneys is highly unrealistic in a case like this. Therefore, because of the special circumstances, I am not going to follow the second circuit's general rules on conflict, even though I recognize that there is a substantial conflict here. Motion denied. The second matter on the agenda, appeal of defendants from the magistrate's order directing depositions of Doctors Bardana, Hartung, and Taylor in Lilley versus Dow, and Hogan versus Dow.

Mr. RIVKIN: The magistrate has set forth many items in discovery and timetables which we believe are unrealistic.

Rather than argue facts, I think the problem I am faced with, I must concede at the very

* * * *

[48] as one has characterized, "Engines of destruction."

When this case was brought, there were only 16,000 plaintiffs who filed in the cases. Many of those were not vets, they were wives and children. 16,000 had come forward and filed cases against the chemical companies. Those who filed had local attorneys. They were prepared for trial before local juries. I think there would have been reasonable results, regardless of whether a win or loss, the case would have been adjudicated, and there would have been settlements which the clients would have been familiar and which the clients would have been happy with. Rather the case was certified as class action and an imprecise definition was fashioned. The class was to include all those veterans who were claiming injury, a claim of injury is a subjective state, impossible to determine who was in fact a class member. Having set up an imprecise definition, there was a problem providing notice to all those that might be class members. Having had a chance to review the record on notice, it is my conclusion that notice was horribly inadequate. There were 2.5 million Viet Nam veterans, and an additional number of wives, an additional number of children.

[49] Rule 23(c) provides all those that could have been identified through reasonable efforts should have received a written notice. Out of the 2.5 million veterans, only 187,600 received written notices. Out of that 187,600 written notices sent, 57,096 of those were returned to the sender as being undeliverable or undelivered. That is approximately one third of all written notices, which were sent out, came back as undelivered or undeliverable. The reason given for that was -- comes from Robert LoCurie, the organizer of the computer center run by Plaintiffs Management Committee. He advised me the primary source for names of the mass

mailing was the Agent Orange registry, a computer containing approximately 87,000 names at that time.

It was necessary to write a program which had the capability of changing the information contained in the Agent Orange registry computer tape to his computer tape which required a switch of information from one field to another. In doing so he advised me that the program was not 100 per cent drug free and in his words a number of the addresses that came out of the computer looked a little funny.

In addition one might inquire why only 187,000 written notices were sent out. Was it in fact impossible or unreasonable to identify Viet Nam veterans? Mr. Ed Matthews, a member of the defense bar, filed an affidavit in opposition to certification of this case as a class action. He set out, after substantial research, a number of sources to identify reasonable efforts for a computerized list of approximately over a million names of the Viet Nam veterans who could have and should have received written notice --

[50] THE COURT: Refresh my recollection:

Did you oppose or any of your clients oppose that certification or the notice?

MR. TAYLOR: Contemporaneous with the certification, no your Honor.

Prior to becoming a member of the Plaintiffs Management Committee we did, yes sir.

THE COURT: You did?

MR. TAYLOR: Prior to becoming a member of the Plaintiffs Management Committee, we set out the standards which would be required for proper notice. I would like to refresh my recollection. That was quite a while ago.

THE COURT: I do not recall receiving any opposition from your firm or your clients when these decisions were being made. As you say, it was a long time ago. You say

you recall opposing the certification after the case was assigned to me?

MR. TAYLOR: No, your Honor.

[51] This was prior to that. Just before we became a member of the Plaintiffs Management Committee, we filled terms with respect to -- what was proper with respect to a class action with respect to notice.

THE COURT: None of your clients or you opposed the certification or the notice at the time?

MR. TAYLOR: It was impossible to oppose at that time, because one had no record. Only through a search of the record have we been able not to determine that inadequate notice was sent out.

THE COURT: I see.

MR. TAYLOR: In fact, your Honor, a search of that record brought to our attention the fact that the Plaintiffs Management Committee had been provided approximately 28,000 mailing addresses of West Virginia Viet Nam veterans, which were to be utilized in providing the original class notice to the West Virginia Viet Nam veterans.

All was required to take the mailing label and put it on an envelope and stuff in that envelope the notice and mail it out.

According to documents which are cited in our brief, and also exhibits in the record, only 8,000 of those 28,000 mailing addresses were utilized. In addition to that there was failure to notify people of whom they actually had addresses, not people that had been identified through a reasonable effort, but **[52]** for which they had reasonable addresses. A computer tape was sent from the State of Massachusetts. That computer tape contained a substantial number, approximately 157,000 names and addresses of Viet Nam veterans. Although there is some indication in the record that perhaps those addresses were not as clear as need be for the purposes of service, I was advised by Robert LoCurie that the

Plaintiffs Management Committee instructed him not to send notices to those veterans, although there is indication in the record that the computer takes two weeks before the opt out deadline -- I believe two weeks before the opt out deadline.

There were substantial problems in the giving of written notices and that problem was not cured by radio and TV notice -- constructive notice. I suggest the record clearly indicates that it was not. Your Honor had only required the Plaintiffs Management Committee to provide written notice in the New York Times and USA Today. Contained in our papers are affidavits provided by the circulation directors of USA Today and the New York Times in the Peoria Illinois area. We didn't chose Peoria to be cute. We have clients who live there and it is important to us to know that they would have received, if not the written notice, the media notice. The circulation figures are contained in our papers --

[53] THE COURT: Your clients received no notice of the settlement and no notice of the class?

MR. TAYLOR: We have to identify -- there were a substantial number who received no written notices by the Plaintiffs Management Committee as to the class and their right to opt out --

THE COURT: Your clients received no notice of the class action and the opt out requirements in a timely fashion?

MR. TAYLOR: We have sent a letter to our clients advising them. However, it is not our position -- it is not -- we should not have been placed in the position --

THE COURT: Your clients received notice, did they not?

MR. TAYLOR: Your Honor, we sent a letter. I have to verify with each client that they received that letter.

THE COURT: What standing do they have on this matter, if they in fact received notice?

MR. TAYLOR: Your Honor, I am not representing those opt out clients at this particular time. What I am doing is putting --

THE COURT: Who are you representing, is the question that I started with?

[54] MR. TAYLOR: I am representing our clients who are members of the class, who are in opposition of the settlement. I am seeking to indicate --

THE COURT: Did those clients not receive notice that you are now claiming is defective?

MR. TAYLOR: As I indicated, a letter was sent to them. I'd have to check with each client to see if they received that letter.

THE COURT: Isn't the best way to give notice to an individual, to have a lawyer send a letter to his client?

MR. TAYLOR: That was done without direction of the Court or request of the Plaintiffs Management Committee. In fact, when representing those who are members of a class, one should not be put in the position to have to notify --

THE COURT: I understand what should have happened, according to your contention. I am wondering what your standing is to object to notice, when you say you yourself gave the notice?

MR. TAYLOR: Your Honor, our clients who are in opposition to the settlement, even though they may have received notice, utilized that as only one factor in seeking to have that settlement overturned. Notice was inadequate as to the class.

[55] THE COURT: Are you representing those members of the class who are not your clients in this argument? That is the question that I am putting to you?

MR. TAYLOR: I do not believe I can do that. I'm only representing my clients who are members of the class.

THE COURT: And you did send each one of them written notice in time to opt out?

MR. TAYLOR: That is correct.

THE COURT: With a suggestion that they do opt out?

MR. TAYLOR: That is correct, your Honor.

THE COURT: I see.

MR. TAYLOR: In addition to the newspaper notice your Honor requested that notice be published in a number of magazines -- too. One was Time Magazine. Through some snafu the Time Magazine article -- the Time Magazine issue, which contained that notice, contained the date April 30, 1983, which your Honor may recall the date for opting out was one day later, May 1 of 1983. From receiving Time Magazine at home I recognize Time is frequently dated one week in advance of the time members would have received that at their homes. One weeks time would have been insufficient amount of time, assuming the veterans received Time Magazine at their home, to have contacted the Plaintiffs Management Committee, had them **[56]** mail to them a full class action notice, having done so to return that to the Plaintiffs Management Committee, or to the computer center. Nor was the problem of notice cured by the utilization of either radio or TV. I have executed an affidavit which you will find in my papers indicating that I spoke with Ms. Jan Levian, whom I note to be a staff attorney with the Plaintiffs Management Committee, and she advised me that only approximately 70, 80 radio stations had filed certificates indicating that the notice had been broadcast across the country. There are thousands of radio stations. Only 70 indicated that they had broadcast the notice and not a single television station indicated that they had broadcast the notice.

Subsequently, at least in my opinion, written notice was defective. The news media, paperprint news media notice was inadequate, and clearly was insufficient notice and utilization of TV or radio.

At the very minimum, it was not the type of notice that the cases require, that one chose that type of notice which one would chose if they were desirous of notifying those that

cannot be identified through reasonable efforts. Had the Plaintiffs Management Committee been desirous of notifying those that could not be identified through reasonable efforts, they should have

* * * *

[70] the veterans leaders throughout the land, as the affidavit of Mr. Todd Ensign, attached to my third supplement to Rule -- to my Rule 59 motion, attests and I could assure this Court one thing, the overwhelming majority of the Vietnam veterans feel that this message that you are entitled to nothing so take the charity we give you, is the ultimate indignity in a long line of seemingly never ending indignities. They do not want a handout, they do not want insulting charity, and they do not want something for nothing.

If under our system of justice they are entitled to nothing, they want nothing. The veterans, your Honor, for once agree with the New York Times view that it would be better if this, and all complex class action cases were "decided not on their costs but on the merits."

(continued on next page)

* * * *

[75] you, your Honor, to the plaintiffs causation memorandum prepared by Tom Henderson, filed with the Court, particularly pages 72-79. In short, each case will have to stand on its own feet and the conclusions as to whether a prima facie case has been made may vary from claimant to claimant.

Therefore, the Court, I would respectfully suggest, could not possibly say that the plaintiffs could not have proven a prima facie case with at least some of those cases.

As to punitive damages, about as shocking as the Court's view, the five representative plaintiffs, did not have a jury question on medical causation was the view that there would be no jury question with respect to punitive damages.

Here, again, as with medical causation of the representative plaintiffs, the Court makes this arbitrary assessment without having heard the evidence. This Court is fully familiar with the evidence that the plaintiffs had in hand of a meeting of the defendant chemical companies or most of them wherein they conspired to keep the knowledge that the Agent Orange contained a highly dangerous and toxic contaminant from the Court and from the Veterans of the United States. They did that knowing the contaminant in question, Dioxin, was one

* * * *

[81] mankind to preserve this infinite planet from toxic poisons and waste pollution.

Your Honor, I wrote this poem. It goes something like this, "Through this tossing world, the last ones and only repast, is in justice we may show our fellow suffering man, let us do it while we can, not delay it. It is plain we shall not pass this way again."

I give you that poem because I believe we're now at the apex of this case. What has gone on before is not going to be as important as what is now, what comes in the future. I'm afraid it's not going to be as important as right now.

The world is watching your Honor. These Veterans are watching. Members of the Armed Forces are now watching to see how we treat the Vietnam Veterans. The lawyers who might bring suit beneficial to all of our society are watching. And the victims of poisoning by pollution everywhere all over the world is watching. This is an important case. I know the Court recognizes this.

I feel very much like the man on death row who is about to have his last meal. I'm afraid to have that meal because I know what's going to happen next. I'm afraid to sit down because I'm afraid I know what's going to happen when I sit down.

All I can say in closing, your Honor, please **[82]** don't precipitously refuse what these Veterans so solemnly asked you to do. You have the power under Rule 59, Rule 60 to amend and alter. We're not asking you at this time that you precipitously bring down the final hammer. Say the settlement is set aside. All we're asking as we say in our papers, is let these Veterans now that they have been fully informed, they know what approximately what the distribution plans call for, they have a pretty good idea what the total number of claims are, now that they can make a true and fair intelligent assessment of what they want to do, give them that freedom of choice, give them that right to stay in or stay out of this settlement.

That's all we ask, your Honor.

THE COURT: Thank you. The Court has carefully considered your argument and your papers. Your motions are, in all respects denied; no costs or disbursements.

Julio Gonzalez. Who are you appearing for?

MR. GONZALEZ: On behalf of my family and myself I hereby make a formal motion to set aside the tentative settlement and if you were to go ahead, if you were to go ahead with the settlement, that you would allow my family and I and those Veterans involved the opportunity now that we know what the hell is going on for the first time. Give us this opportunity to either stay in or opt out.

* * * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE
"AGENT ORANGE"
PRODUCT LIABILITY LIGTIGATION

No. 84-6273*

Appeal from Orders of the
United States District Court for
the Eastern District of New York

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*84-6273, 84-6321, 85-6035, 85-6051
85-6083, 85-6261, 85-6265, 85-6301
85-6303, 85-6307, 85-6323, 85-6325
85-6327, 85-6329, 85-6335, 85-6349
85-6371, 85-6373, 85-6379, 85-6381
85-6385, 85-6387, 85-6393, 85-6395, 85-6411

REPLY BRIEF OF APPELLANTS
(Objectors to the Class Action Settlement)
(Reply to Chemical Companies' Brief_

[Excerpts]

* * * *

[15] The Chemical Companies note that many individual suits filed elsewhere were multidistricted to the Eastern District of New York for pretrial purposes. The pertinence of that assertion is unclear, for the multidistricted cases were all dismissed and it is a separate, class action suit that is here on appeal. Are the Chemical Companies arguing that, whenever one is multidistricted to a distant state for pretrial purposes under 28 U.S.C. 1407, he is then deemed to be there for all purposes and may be subject to personal jurisdiction in any

matter whatsoever? The Chemical Companies cite no authority for that proposition; nor can they, for the proposition is so violative of traditional notions of personal jurisdiction to be devoid of precedent as well as of reason.[7]

The *Erie Railroad-Arrowsmith* line of cases and the usurpation-of-legislative-power proposition put forth in the Appellants' Main Brief are completely ignored. We suggest that the reason is clear: neither the PMC nor the Chemical Companies were successful in finding any authority or any line of reasoning to the contrary, based upon our legal system, the separation of powers between judiciary and legislature, and the balance between federal and state authority in diversity cases long settled by *Erie Railroad* and by *Arrowsmith*. On these grounds alone, reversal is required.

F. Notice. The Chemical Companies' argument on notice is most perplexing. Clearly, no one knew how many persons who served **[16]** in Vietnam had been exposed to Agent Orange, had manifested injury from Agent Orange or would manifest such injury in the future, or who they were. All that was known as [sic] that they were within the 2.4 million persons who served in Vietnam. A notice sent to each of those persons who could be found, plus extensive publication, would insure that notice reached al persons possible who were included in the class. The Chemical Companies object to sending notice to this "overinclusive group" (Br. 37). But they do not complain about sending notice to an *underinclusive* group, as admittedly was done here. We respectfully suggest that this attitude—which permits the wiping out of thousands of personal, individual claims without notice—because of the desire not to furnish notice to an "overinclusive group" of all those who were in a position to be exposed to Agent Orange is indicative of the

[7] The Chemical Companies of course do not even attempt to explain the pertinence of the multidistricted cases to those persons swept into the class who had not been a party to a multidistricted case.

callous attitude of the Appellees toward the members of the class involved in this case.

The Chemical Companies tell this Court (Br. 38) that available lists (the VADS files and lists of Navy and Marine service persons) did not include the names and addresses of veterans discharged before 1973 and Air Force Reserve records go back only into the early of mid 70s: But Chemical Companies furnish no reason not to use the lists for those who were on it. Apparently, here underinclusiveness, which the Chemical Companies seem to champion elsewhere, is wrong. The Chemical Companies tell us that money spent searching government files would produce only an underinclusive list. Somehow, we respectfully submit, the logic that it is better to give no notice to those persons than it is to give notice to **[17]** those who could be found appears to be lacking: certainly it is not supplied by the Chemical Companies.

The issue appears to come down to whether it is reasonable to spend money to find the names and addresses of all possible class members before their individual, personal causes of action are wiped out. The Chemical Companies would say no. To them it is more reasonable to wipe out individual, personal causes of action without notice than to spend the funds necessary to find the members of the class that, by the Chemical Companies' own admission (Br. 38) are findable from available lists. That, we respectfully suggest, is not due process, and is not sustainable under *Mullane v. Hanover Bank*, 339 U.S. 306 (1950), or *Eisen v. Carlisle*, 417 U.S. 156 (1974). Moreover, it runs directly contrary to the Supreme Court's most recent holding in *Phillips Petroleum v. Shutts*, 105 S.Ct. 2965 (1985), where only those persons actually notified were included in the class.

Counsel for the Chemical Companies do tell us, however, that "by 1983, virtually all Vietnam veterans who were concerned about possible exposure to Agent Orange

undoubtedly were included by the Veterans Administration on the Agent Orange Registry or were aware of the class action." Br. 35. We respectfully submit that this unsworn testimony by counsel is not worthy of a case of this importance, of this Court, or the stature of counsel. Moreover, it ignores the record. One need only look at the affidavits filed by the *Eddelmon* group of veteran to see that many veterans did not

* * * *

JOE ISAACSON and PHYLLIS LISA ISAACSON, his wife Plaintiffs	SUPERIOR COURT OF NEW JERSEY LAW DIVISION OCEAN COUNTY
v.	DOCKET NO:
DOW CHEMICAL COMPANY; MONSANTO COMPANY; AMERICAN HOME PRODUCTS, INC.; HERCULES, INCORPORATED; THOMPSON HAYWARD CHEMICAL CO.; T-H AGRICULTURE & NUTRITION CO.; OCCIDENTAL CHEMICAL CORPORATION; UNIROYAL, INC.; C.D.U. HOLDING, INC.; UNIROYAL CHEMICAL COMPANY; HARCROS CHEMICALS INC; ULTRAMAR DIAMOND SHAMROCK CORPORATION, MAXUS ENERGY CORP, and CHEMICAL LAND HOLDINGS, INC. AND DOES 1 THROUGH 100 Defendants	**CIVIL ACTION COMPLAINT**

PLAINTIFFS

1. The Plaintiffs are Joe Isaacson and his wife Phyllis Lisa Isaacson, who reside at 308 Ashford Road, Toms River, New Jersey. Joe Isaacson ("Plaintiff") served in Vietnam during the hostilities from 1968 to 1969 where he served as a crew chief for the 615 attack fighter squadron stationed at Phang Rang. While he was in Vietnam, he was exposed to the Defendants' product, Agent Orange herbicides with dioxin contamination, and sustained various injuries alleged herein.

DEFENDANTS

2. Defendant Dow Chemical Company is a Delaware corporation with its principal place of business in Midland, Michigan.

3. Defendant Monsanto Company is a Delaware corporation with its principal place of business in St. Louis Missouri.

4. Defendant American Home Products, Inc. is a Delaware Corporation with its principal place of business in New Jersey.

5. Defendant Hercules Incorporated is a Delaware corporation with its principal place of business in Wilmington, Delaware.

6. Defendants Thompson Hayward Chemical Co. a/k/a Thompson Chemical Corporation and T-H Agriculture & Nutrition Company are Delaware corporations with its principal places of business in Kansas City, Kansas.

7. Defendant Occidental Chemical Corporation is a New York corporation with its principal place of business in Dallas, Texas.

8. Defendants Uniroyal, Inc., C.D.U. Holding, Inc. and Uniroyal Chemical Company are New Jersey corporations with their principal places of business in Middlebury Connecticut.

9. Defendant Harcros Chemicals Inc. is a Delaware corporation with its principal place of business in Kansas City, Kansas.

10. Ultramar Diamond Shamrock Corporation, Chemical Land Holdings, Inc. and Maxus Energy Corporation are related corporations with their principal place of business in San Antonio, Texas.

11. Defendants Does 1 through 100 are other corporations which presently cannot be identified who directly or through their corporate predecessors or subsidiaries manufactured, marketed, distributed and sold Agent Orange.

ACTS OF DEFENDANTS

12. During the period of 1961 to 1972 each of the corporate Defendants designed, manufactured, marketed, distributed and sold to the United States Government the phenoxy herbicides (hereinafter collectively described as Agent Orange herbicides), known as Agent Orange, Orange II, Purple, Pink and Green, and whose basic component formulations were:

a. Agent Orange was a 50/50 mixture of the n-butyl esters of 2,4-D and 2,4,5-T (2,4,5-tricholorophenoxyacetic acid);

b. Agent Orange II was a 50/50 mixture of the isooctyl ester of 2,4,5-T and the n-butyl ester of 2,4-D;

c. Agent Purple was a 50/30/20 by weight mixture of the n-butyl ester of 2,4,-D, n-butyl ester of 2,4,5-T and isobutyl ester of 2,4,5-T;

d. Agent Pink was a 60/40 by weight mixture of n-butyl ester of 2,4,5-T and the isobutyl ester of 2,4,5-T;

e. Agent Green was a single component formulation consisting of n-butyl of 2,4,5-T.

13. The Agent Orange herbicides manufactured and sold by the Defendants to the United States Government for use in Vietnam during the aforesaid period contained deadly toxic contaminants including dioxins which were inherently dangerous to human health and capable of causing severe injuries to persons exposed thereto, one of which dioxins is the most toxic and deadly, that being 2,3,7,8-tetrachlorodibenzo para dioxin, more commonly referred to as "TCDD" or "dioxin".

14. Each Defendant's Agent Orange herbicides, as so supplied to the military for use in Vietnam contained the toxic contaminant dioxin, was defective, and unreasonably dangerous to the plaintiff.

INJURY TO PLAINTIFF

15. As direct and proximate results of the acts described above, the Plaintiff was caused to suffer grievous, serious, and severe injuries, and sustained serious and permanent injuries to his health, strength and activity, and severe shock to his nervous system, including but not limited to non-Hodgkin's lymphoma, which perforated his colon and involved the small bowel, requiring a resection of the right colon and terminal ileum, constant diarrhea and was caused to suffer and will continue to suffer physical injuries and mental pain, a loss of earnings and impairment of future earning capacity.

16. As a further proximate result of the defendants' wrongful conduct, plaintiff was required to, and did, employ physicians and surgeons to examine, treat and care for him, and plaintiff incurred, and will incur, hospital, medical and other and additional incidental expenses.

17. As a further proximate result of the defendants' wrongful conduct, wife plaintiff was deprived of her husband's services, companionship and consortium.

COUNT I

PRODUCT LIABILITY

Strict Liability in Tort

DESIGN DEFECT

18. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraph.

19. During the period from 1961 to 1972 each of the Defendants designed, manufactured, and sold the United States Government the contaminated Agent Orange herbicides known as dioxin.

20. At all times herein mentioned, the Defendants had a duty to make a safe product and breached that duty by designing and manufacturing the Agent Orange herbicides which were defective and unreasonably dangerous.

21. But for the design defect of the Defendants, the Plaintiff would not have sustained his injuries.

22. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the plaintiff.

23. As actual and proximate results of the Defendants' defective products, the plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

24. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to Plaintiff.

Strict Liability in Tort

INADEQUATE WARNING

25. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

26. During the period from 1961 to 1972 each Defendant designed, manufactured, and sold to the United States Government the contaminated Agent Orange

herbicides for use in Vietnam by Plaintiff and persons in his position.

27. The Defendants had a duty to give warnings as to the danger of their products and breached that duty by manufacturing the Agent Orange herbicides without such adequate warning, rendering their products defective and unreasonably dangerous.

28. The Plaintiff had no reason to expect or anticipate that the Agent Orange herbicides would cause such severe harm.

29. The Defendants did not give an adequate warning as to the danger of the defective products either to the United States Government Officials responsible for decision to deploy the Agent Orange herbicides or to the Plaintiffs who were at risk from the danger of the defective products.

30. But for the inadequate warning of the Defendants, the Plaintiff would not have sustained his injuries.

31. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries on the Plaintiff who was a foreseeable victim.

32. As actual and proximate results of the Defendants' inadequate warning, the Plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

33. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to Plaintiff.

COUNT II

BREACH OF WARRANTY

Breach of Implied Warranty

34. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

35. Each Defendant impliedly warranted the merchantability of the Agent Orange herbicides which they

supplied to the Government and that such herbicides would be reasonably fit for the purpose of defoliating the jungles, for which they were to be used by the military in Vietnam, and that they were relatively non-toxic to human beings and animals.

36. Each Defendant breached its implied warranty of merchantability in that the Agent Orange herbicides it supplied to the Government were not reasonably fit for the purposes for which they were to be used, especially so because of the presence of the toxic contaminant dioxin. Each Defendant breached it implied warranty that the Plaintiff exposed to such herbicides would be safe from personal injuries due to such exposure in that such exposure did in fact cause or contribute to the Plaintiff's serious injuries as hereinbefore alleged.

37. But for the Defendants' breach of their implied warranty, the Plaintiff would not have sustained his injuries.

38. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the Plaintiff.

39. As actual and proximate results of the Defendants' breach of their express warranty, the Plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

40. By reason of the Defendants' breach of their express warranties, the Defendants are individually, jointly and severally liable for the Plaintiff's injuries and responsible for and must pay the Plaintiff's special, general, compensatory and punitive damages.

COUNT III

Negligence

DESIGN AND PRODUCTION

41. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

42. During the period from 1961 to 1972 each Defendant designed, manufactured, and sold to the United States Government the contaminated Agent Orange herbicides.

43. The Defendants had a duty to make safe product and breached the duty by manufacturing the Agent Orange herbicides that were defective and unreasonably dangerous.

44. Each corporate Defendant negligently designed and produced Agent Orange herbicides it supplied to the United States Government for use in Vietnam in that each Defendant:

a. Failed to design its herbicides so that they were free from the toxic contaminant dioxin;

b. failed to follow reasonable manufacturing methods and procedure that would avoid the formation of or eliminate the toxic contaminant dioxin;

c. failed to test the Agent Orange herbicides to insure that they were free from the toxic contaminant dioxin.

45. The Defendants owned or controlled virtually all of the Agent Orange herbicide market and product capacity and supplied to the military, the sole source purchaser, over 99% of the herbicides contracted for, and received over 99% of the purchase price.

46. Each Defendant's herbicide was toxic and harmful to human health and contaminated with dioxin in varying degrees.

47. But for the defective design of the Defendants, the Plaintiff would not have sustained his injuries.

48. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries on the Plaintiff who was a foreseeable victim.

49. As actual and proximate results of the Defendants' negligent design, the Plaintiff was exposed to the

Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

50. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfesors to pay such damages to the Plaintiff.

CLAIMS UNDER NEGLIGENCE

First Claim: Breach of Duty to Warn as to the Defendants' Products

51. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

52. The Defendants, individually and collectively, knew or should have known of the following:

a. That dioxin, its extreme toxicity, its presence in the manufacturing process and the herbicides themselves, and variables determining levels of dioxin in the chemical herbicides' manufacturing process, and its existence in the herbicides, created a substantial risk to human health;

b. That exposure to the herbicides would be harmful to humans by reason of historical experiences involving occupation related injuries to workers following exposure to dioxin-contaminated materials in Defendants' manufacturing facilities in addition to substantial scientific information in the Defendants' possession, custody and control, evidencing the extreme toxicity of such material;

c. That the levels of dioxin contamination in the herbicides manufactured for use in Vietnam could be reduced by the use of appropriate analytical and detection procedures, coupled with alternative and careful methods of manufacturing or quality control and that the

Defendants could have eliminated the substantial risk to human health involved in the use of the herbicides in Vietnam;

d. That the Defendants already had information in the form of judgments and assessments of the risks to health;

e. That the deployment and use of the herbicides manufactured by the Defendants in Vietnam could and would cause substantial adverse affects to persons who were exposed to the herbicides.

53. That during the period of 1961 to 1972, the United States Government officials responsible for the decision to deploy the Agent orange herbicides in Vietnam did not know about the aforesaid types of information with respect to Agent Orange herbicides' manufacturing processes, dioxin as contaminant, detection and risk reduction methods, and health hazards associated with human exposure to such herbicides.

54. During the period from 1961 to 1972, the Defendants had a duty to but failed to warn and share with the Government and the Plaintiff, the aforesaid information which the Defendants knew or should have known with respect to the Agent Orange herbicides they were supplying to the United States Government for use in Vietnam.

55. During the period from 1961 to 1972, the Defendants also knew that the dioxin contaminated Agent Orange herbicides which they were supplying to the Government would be contained in drums unmarked with any corporate identification and mixed together with other contaminated Defendants' products before being sprayed in Vietnam.

56. By reason of the Defendants' failure to warn the Government and the Plaintiff of the health hazards accompanying the use of the dioxin contaminated Agent Orange herbicides being sold to the Government, and by

reason of the Defendants' failure to share with the Government and the plaintiff all they or any of them knew or should have known with respect to the Agent Orange manufacturing process, dioxin as contaminant and detection and risk reduction methods, the Government's resulting ignorance affected not only what was put in or omitted from the contract specifications, but also the standards applied to determine whether each Defendant's product conformed to the specification.

57. By reason of each Defendant's breach of its duty to warn and to share such information with the Government and military, the Government and military were prevented from:

a. making an informed decision not to use a particular Defendant's dioxin contaminated herbicides.

b. imposing protective safety measures in connection with the use of Agent Orange herbicides in Vietnam; or prescribing their use in a manner that would have protected the risk of exposure to the military servicemen;

c. providing exposed soldiers prophylactic medical examinations and treatment to avert or mitigate injuries caused by such exposure; and

d. deciding not to use such herbicides in the Vietnam conflict whatsoever, or, alternatively, to sharply curtail their use in a limited fashion designed to prevent human exposures to injuries.

58. Each of the Defendant's failure to warn the responsible Government and military officials and to share its information as above alleged prevented the military and Government from taking the actions described in the above paragraphs.

59. But for the negligent failure of the Defendants to warn, the Plaintiff would not have sustained his injuries.

60. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the Plaintiff.

61. As actual and proximate results of each Defendant's breach of its aforesaid duties, the plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries, diseases, physical disorders and irritations, for which the plaintiff is entitled to and seeks to recover monetary damages from the Defendants.

62. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to the Plaintiff.

Second Claim: Breach of Duty to Warn as to the other Defendants' Products

63. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

64. Each Defendant knew or should have known that the other Defendants were manufacturing and selling to the military dioxin contaminated Agent Orange herbicides for use in Vietnam during the period 1961 and 1972.

65. Each Defendant knew or should have known that the Agent Orange herbicides being supplied by other defendants to the military for use in Vietnam were dangerous to human health.

66. Each Defendant knew or should have known that the other Defendants failed to warn the Government and/or the Plaintiff as to the health hazards associated with the use of their products and that the other Defendants had also failed to share with the Government and/or with the Plaintiff what they knew or should have known with respect to the Agent Orange manufacturing processes, dioxin as a contaminant and detection and risk reduction methods.

67. Each Defendant knew or should have known that none of the barrels of Agent Orange they sold to the government contained any company identifying marks, and

that the Agent Orange herbicides shipped to Vietnam would be mixed and sprayed without discrimination as to which Defendant's product was being utilized and that the Plaintiff would be exposed to such dioxin contaminated herbicides and would suffer the injuries complained of.

68. Each Defendant's breach of its duty to warn and to share with the Government and/or with Plaintiff the information with respect to the other Defendants' dioxin contaminated herbicides, the health hazards associated therewith and the means of detection, risk avoidance and risk reduction, was a substantial factor in preventing the military from taking the action described in Paragraph.

69. The Defendants failure to warn as to the other Defendants' defective products was a substantial factor in bringing about the harm the Plaintiff suffered.

70. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries on the Plaintiff who was a foreseeable victim.

71. As actual and proximate results of each Defendant's breach of its aforesaid duties, the plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries, diseases, physical disorders and irritations, for which the plaintiff is entitled to and seeks to recover monetary damages from the Defendants.

72. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to the Plaintiff.

CLAIMS UNDER FRAUD AND MISREPRESENTATION

73. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

74. Each Defendant knew its product was hazardous to human health and contaminated. Each Defendant knew that the other Defendants' herbicides were hazardous and contaminated with dioxin. None of the Defendants warned

the uninformed, less expert, military, or informed it either of the toxicity of the herbicides or of the dioxin contamination and the means of its avoidance or elimination.

75. The Defendants instead falsely and fraudulently represented to the United States Government Officials, conspired and acted in concert secretly and persistently to deceive the military and other governmental agencies about the matters hereinbefore alleged through misrepresentations, suppression and withholding of information and other schemes.

76. The Defendants knew that each other's herbicides were dangerous to human health and contaminated with dioxin; that each other's products constituted a breach of duty to warn, and that each was negligent in the design and production of the Agent Orange herbicides being supplied to the government or use in Vietnam and that exposure to such herbicides could and would cause injuries to the Plaintiff.

77. The Defendants concurrently, with their conspiracy of concealment and failure to warn the military as hereinbefore alleged, misrepresented the safety of their herbicides to the military and other Government agencies. Despite its extensive knowledge of health hazards, a Defendants, Dow Chemical Company, misrepresented to the United States military that they had been manufacturing 2,4-D and 2,4,5-T for over ten years and to the best of their knowledge, none of the workmen in their factories have shown any ill effects as a result of working with these chemicals.

78. During the years 1966 and 1967, at times when all Defendants were selling dioxin contaminated herbicides to the military, they formed a Joint Industry Task Force, under the auspices of the National Agricultural Chemicals Association, an organization owned, operated, managed and controlled by the chemical industry whose purpose was to declare Defendant's Agent orange herbicides to be toxicologically safe. During the period of its existence, the

Defendants' Task Force misrepresented to and deceived the Government concerning the nature and the extent of the toxicological data as to hazards which was locked within the Defendants' confidential files.

79. The Defendants and each of them knew of health hazards associated with exposure to such herbicides and each of them during the period in question either made affirmative statements misrepresenting material facts concerning such hazards or willfully did not disclose such material facts by conscious and willful omission.

80. By reason of the Defendants' such misrepresentations, the military and the Government were lulled into a belief that the Defendants' Agent Orange herbicides were safe to human health, and the military was prevented from taking the actions described in the above Paragraphs.

81. The Agent Orange herbicides manufactured by the Defendants were not produced in accordance with military specifications set forth in their Government contracts.

82. The Government contracts, pursuant to which the Defendants manufactured their Agent Orange herbicides, did not order, request, or put limitations on any permissible level of the toxic contaminant dioxin. The herbicides produced by the Defendants were generally similar except that they contained varying degrees of the toxic contaminant dioxin. The Defendants jointly controlled all of the manufacturing processes used in the production of the Agent Orange herbicides supplied to the military.

83. Each of the Defendants' products was defective and dangerous to human health, especially in view of the presence of the toxic contaminant dioxin.

84. By reason of the foregoing, each Defendant is individually, jointly and severally liable for the injuries suffered by the Plaintiff and is responsible for and must pay all special, general, compensatory and punitive damages.

CLAIMS FOR PUNITIVE DAMAGES

85. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

86. Each Defendant knew or had reason to know not only that its conduct and the other Defendants' conducts created an unreasonable risk of harm to the Plaintiff but also that such harm was substantially certain to occur. Nevertheless, each Defendant proceeded with its conduct in reckless or conscious disregard of such consequences to the Plaintiff.

87. As actual and proximate results, the Plaintiff suffered the injuries complained thereof, and is entitled to punitive damages, in addition to special, general, and compensatory damages.

88. Wherefore, the Plaintiff demands judgment of the "corporate Defendants" THE DOW CHEMICAL COMPANY, MONSANTO CO., HERCULES INCORPORATES, T-H AGRICULTURE & NUTRITION COMPANY, OCCIDENTAL CHEMICAL CORPORATION, UNIROYAL, INC., and HARCROS CHEMICALS, INC. AND DOES 1 THROUGH 100, for the following relief:

a. Judgment in such sums as this Court and jury shall find in favor of the Plaintiff as shall fully, adequately and completely compensate him for all usual and customary elements of damage awardable in cases of personal injuries, both general and special, including but not limited to physical pain and mental suffering, past, present and future, the reasonable and necessary costs of medical and hospital services and treatments, past, present and future, loss of earnings, disabilities, disfigurements, loss of society, consortium, services and companionship, and all other recognized losses, costs and damages incurred by the Plaintiff, his wife, his family

and next of kin with direct and derivative claims;

b. Judgment in favor of the Plaintiff and for his punitive damages in an amount to be determined by the Court and jury of sufficient magnitude to adequately punish Defendants and each of them, jointly and severally, by reason of their willful and wrongful conduct and the great magnitude of damages which it has wrought;

c. Together with such other and further relief as to this Court shall seem just and proper under the circumstances, plus interest, reasonable counsel fees and the costs and disbursements of this action.

Respectfully submitted,

Dated: _____

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOE ISAACSON and PHYLLIS LISA ISAACSON, his wife	Hon. Anne E. Thompson
Plaintiffs	Civil Action No.: 3-98cv03988
v.	AMENDED COMPLAINT
DOW CHEMICAL COMPANY, MONSANTO COMPANY; AMERICAN HOME PRODUCTS, INC.; HERCULES, INCORPORATED; THOMPSON HAYWARD CHEMICAL CO.; T-H AGRICULTURE & NUTRITION CO.; OCCIDENTAL CHEMICAL CORPORATION; UNIROYAL, INC.; C.D.U. HOLDING, INC.; UNIROYAL CHEMICAL COMPANY; HARCROS CHEMICALS INC; ULTRAMAR DIAMOND SHAMROCK CORPORATION, MAXUS ENERGY CORP, and CHEMICAL LAND HOLDINGS, INC. AND DOES 1 THROUGH 100	[FILED: Sept. 10, 1998]

Defendants

PLAINTIFFS

1. The Plaintiffs are Joe Isaacson and his wife Phyllis Lisa Isaacson, who reside at 308 Ashford Road, Toms River, New Jersey. Joe Isaacson ("Plaintiff") served in Vietnam during the hostilities from 1968 to 1969 where he served as a crew chief for the 615 attack fighter squadron stationed at Phang Rang. While he was in Vietnam, he was exposed to the Defendants' product, Agent Orange herbicides with dioxin contamination, and sustained various injuries alleged herein.

DEFENDANTS

2. Defendant Dow Chemical Company is a Delaware corporation with its principal place of business in Midland, Michigan.

3. Defendant Monsanto Company is a Delaware corporation with its principal place of business in St. Louis Missouri.

4. Defendant American Home Products, Inc. is a Delaware Corporation with its principal place of business in New Jersey.

5. Defendant Hercules Incorporated is a Delaware corporation with its principal place of business in Wilmington, Delaware.

6. Defendants Thompson Hayward Chemical Co. a/k/a Thompson Chemical Corporation and T-H Agriculture & Nutrition Company are Delaware corporations with its principal places of business in Kansas City, Kansas.

7. Defendant Occidental Chemical Corporation is a New York corporation with its principal place of business in Dallas, Texas.

8. Defendants Uniroyal, Inc., C.D.U. Holding, Inc. and Uniroyal Chemical Company are New Jersey corporations with their principal places of business in Middlebury Connecticut.

9. Defendant Harcros Chemicals Inc. is a Delaware corporation with its principal place of business in Kansas City, Kansas.

10. Ultramar Diamond Shamrock Corporation, Chemical Land Holdings, Inc. and Maxus Energy Corporation are related corporations with their principal place of business in San Antonio, Texas, and manufactured Agent Orange in New Jersey.

11. Defendants Does 1 through 100 are other corporations which presently cannot be identified who directly or through their corporate predecessors or subsidiaries manufactured, marketed, distributed and sold Agent Orange.

ACTS OF DEFENDANTS

12. During the period of 1961 to 1972 each of the corporate Defendants designed, manufactured, marketed, distributed and sold to the United States Government the phenoxy herbicides (hereinafter collectively described as Agent Orange herbicides), known as Agent Orange, Orange II, Purple, Pink and Green, and whose basic component formulations were:

a. Agent Orange was a 50/50 mixture of the n-butyl esters of 2,4-D and 2,4,5-T (2,4,5-tricholorophenoxyacetic acid);

b. Agent Orange II was a 50/50 mixture of the isooctyl ester of 2,4,5-T and the n-butyl ester of 2,4-D;

c. Agent Purple was a 50/30/20 by weight mixture of the n-butyl ester of 2,4,-D, n-butyl ester of 2,4,5-T and isobutyl ester of 2,4,5-T;

d. Agent Pink was a 60/40 by weight mixture of n-butyl ester of 2,4,5-T and the isobutyl ester of 2,4,5-T;

e. Agent Green was a single component formulation consisting of n-butyl of 2,4,5-T.

13. The Agent Orange herbicides manufactured and sold by the Defendants to the United States Government for use in Vietnam during the aforesaid period contained deadly toxic contaminants including dioxins which were inherently dangerous to human health and capable of causing severe injuries to persons exposed thereto, one of which dioxins is the most toxic and deadly, that being 2,3,7,8-tetrachlorodibenzo para dioxin, more commonly referred to as "TCDD" or "dioxin".

14. Each Defendant's Agent Orange herbicides, as so supplied to the military for use in Vietnam contained the toxic contaminant dioxin, was defective, and unreasonably dangerous to the plaintiff.

INJURY TO PLAINTIFF

15. As direct and proximate results of the acts described above, the Plaintiff was caused to suffer grievous, serious, and severe injuries, and sustained serious and permanent injuries to his health, strength and activity, and severe shock to his nervous system, including but not limited to non-Hodgkin's lymphoma, which was manifested and diagnosed less than two years before commencement of this action and which perforated his colon and involved the small bowel, requiring a resection of the right colon and terminal ileum, constant diarrhea and was caused to suffer and will continue to suffer physical injuries and mental pain, a loss of earnings and impairment of future earning capacity.

16. As a further proximate result of the defendants' wrongful conduct, plaintiff was required to, and did, employ physicians and surgeons to examine, treat and care for him, and plaintiff incurred, and will incur, hospital, medical and other and additional incidental expenses.

17. As a further proximate result of the defendants' wrongful conduct, wife plaintiff was deprived of her husband's services, companionship and consortium.

COUNT I

PRODUCT LIABILITY

Strict Liability in Tort

DESIGN DEFECT

18. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraph.

19. During the period from 1961 to 1972 each of the Defendants designed, manufactured, and sold the United States Government the contaminated Agent Orange herbicides known as dioxin.

20. At all times herein mentioned, the Defendants had a duty to make a safe product and breached that duty by designing and manufacturing the Agent Orange herbicides which were defective and unreasonably dangerous.

21. But for the design defect of the Defendants, the Plaintiff would not have sustained his injuries.

22. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the plaintiff.

23. As actual and proximate results of the Defendants' defective products, the plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

24. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to Plaintiff.

Strict Liability in Tort

INADEQUATE WARNING

25. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

26. During the period from 1961 to 1972 each Defendant designed, manufactured, and sold to the United States Government the contaminated Agent Orange herbicides for use in Vietnam by Plaintiff and persons in his position.

27. The Defendants had a duty to give warnings to the United States Government of the danger of their products and breached that duty by manufacturing the Agent Orange herbicides without such adequate warning, rendering their products defective and unreasonably dangerous.

28. The Plaintiff had no reason to expect or anticipate that the Agent Orange herbicides would cause such severe harm.

29. The Defendants did not give an adequate warning as to the danger of the defective products either to the United States Government Officials responsible for decision to deploy the Agent Orange herbicides or to the Plaintiffs who were at risk from the danger of the defective products.

30. But for the Defendants' failure to provide adequate warnings to the United States Government, the Plaintiff would not have sustained his injuries.

31. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries on the Plaintiff who was a foreseeable victim.

32. As actual and proximate results of the Defendants' inadequate warning, the Plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

33. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to Plaintiff.

COUNT II

BREACH OF WARRANTY

Breach of Implied Warranty

34. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

35. Each Defendant impliedly warranted the merchantability of the Agent Orange herbicides which they supplied to the Government and that such herbicides would be reasonably fit for the purpose of defoliating the jungles, for which they were to be used by the military in Vietnam, and that they were relatively non-toxic to human beings and animals.

36. Each Defendant breached its implied warranty of merchantability in that the Agent Orange herbicides it supplied to the Government were not reasonably fit for the purposes for which they were to be used, especially so because of the presence of the toxic contaminant dioxin. Each Defendant breached it implied warranty that the Plaintiff exposed to such herbicides would be safe from personal injuries due to such exposure in that such exposure did in fact cause or contribute to the Plaintiff's serious injuries as hereinbefore alleged.

37. But for the Defendants' breach of their implied warranty, the Plaintiff would not have sustained his injuries.

38. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the Plaintiff.

39. As actual and proximate results of the Defendants' breach of their express warranty, the Plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

40. By reason of the Defendants' breach of their express warranties, the Defendants are individually, jointly and severally liable for the Plaintiffs injuries and responsible for

and must pay the Plaintiff's special, general, compensatory and punitive damages.

COUNT III

Negligence

DESIGN AND PRODUCTION

41. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

42. During the period from 1961 to 1972 each Defendant designed, manufactured, and sold to the United States Government the contaminated Agent Orange herbicides.

43. The Defendants had a duty to make safe product and breached the duty by manufacturing the Agent Orange herbicides that were defective and unreasonably dangerous.

44. Each corporate Defendant negligently designed and produced Agent Orange herbicides it supplied to the United States Government for use in Vietnam in that each Defendant:

a. Failed to design its herbicides so that they were free from the toxic contaminant dioxin;

b. failed to follow reasonable manufacturing methods and procedure that would avoid the formation of or eliminate the toxic contaminant dioxin;

c. failed to test the Agent Orange herbicides to insure that they were free from the toxic contaminant dioxin.

45. The Defendants owned or controlled virtually all of the Agent Orange herbicide market and product capacity and supplied to the military, the sole source purchaser, over 99% of the herbicides contracted for, and received over 99% of the purchase price.

46. Each Defendant's herbicide was toxic and harmful to human health and contaminated with dioxin in varying degrees.

47. But for the defective design of the Defendants, the Plaintiff would not have sustained his injuries.

48. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries on the Plaintiff who was a foreseeable victim.

49. As actual and proximate results of the Defendants' negligent design, the Plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries complained thereof.

50. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfesors to pay such damages to the Plaintiff

CLAIMS UNDER NEGLIGENCE

First Claim: Breach of Duty to Warn

as to the Defendants' Products

51. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

52. The Defendants, individually and collectively, knew or should have known of the following:

a. That dioxin, its extreme toxicity, its presence in the manufacturing process and the herbicides themselves, and variables determining levels of dioxin in the chemical herbicides' manufacturing process, and its existence in the herbicides, created a substantial risk to human health;

b. That exposure to the herbicides would be harmful to humans by reason of historical experiences involving occupation related injuries to workers following exposure to dioxin-contaminated materials in Defendants'

manufacturing facilities in addition to substantial scientific information in the Defendants' possession, custody and control, evidencing the extreme toxicity of such material;

c. That the levels of dioxin contamination in the herbicides manufactured for use in Vietnam could be reduced by the use of appropriate analytical and detection procedures, coupled with alternative and careful methods of manufacturing or quality control and that the Defendants could have eliminated the substantial risk to human health involved in the use of the herbicides in Vietnam;

d. That the Defendants already had information in the form of judgments and assessments of the risks to health;

e. That the deployment and use of the herbicides manufactured by the Defendants in Vietnam could and would cause substantial adverse affects to persons who were exposed to the herbicides.

53. That during the period of 1961 to 1972, the United States Government officials responsible for the decision to deploy the Agent orange herbicides in Vietnam did not know about the aforesaid types of information with respect to Agent Orange herbicides' manufacturing processes, dioxin as contaminant, detection and risk reduction methods, and health hazards associated with human exposure to such herbicides.

54. During the period from 1961 to 1972, the Defendants had a duty to but failed to warn and share with the Government, the aforesaid information which the Defendants knew or should have known with respect to the Agent Orange herbicides they were supplying to the United States Government for use in Vietnam.

55. During the period from 1961 to 1972, the Defendants also knew that the dioxin contaminated Agent Orange herbicides which they were supplying to the Government would be contained in drums unmarked with any corporate identification and mixed together with other contaminated Defendants' products before being sprayed in Vietnam.

56. By reason of the Defendants' failure to warn the Government of the health hazards accompanying the use of the dioxin contaminated Agent Orange herbicides being sold to the Government, and by reason of the Defendants' failure to share with the Government all they or any of them knew or should have known with respect to the Agent Orange manufacturing process, dioxin as contaminant and detection and risk reduction methods, the Government's resulting ignorance affected not only what was put in or omitted from the contract specifications, but also the standards applied to determine whether each Defendant's product conformed to the specification.

57. By reason of each Defendant's breach of its duty to warn and to share such information with the Government and military, the Government and military were prevented from:

a. making an informed decision not to use a particular Defendant's dioxin contaminated herbicides.

b. imposing protective safety measures in connection with the use of Agent Orange herbicides in Vietnam; or prescribing their use in a manner that would have protected the risk of exposure to the military servicemen;

c. providing exposed soldiers prophylactic medical examinations and treatment to avert or mitigate injuries caused by such exposure, and

d. deciding not to use such herbicides in the Vietnam conflict whatsoever, or, alternatively, to sharply curtail their use in a limited fashion

designed to prevent human exposures to injuries.

58. Each of the Defendant's failure to warn the responsible Government and military officials and to share its information as above alleged prevented the military and Government from taking the actions described in the above paragraphs.

59. But for the negligent failure of the Defendants to warn, the Plaintiff would not have sustained his injuries.

60. The Defendants' defective products were used in foreseeable manners and brought about foreseeable injuries to the Plaintiff.

61. As actual and proximate results of each Defendant's breach of its aforesaid duties, the plaintiff was exposed to the Defendants' herbicides and was thereby caused to suffer severe injuries, diseases, physical disorders and irritations, for which the plaintiff is entitled to and seeks to recover monetary damages from the Defendants.

62. By reason of the foregoing, each Defendant is individually, jointly and severally liable as tortfeasors to pay such damages to the Plaintiff.

Second Claim: Breach of Duty to Warn as to the other Defendants' Products

63. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

64. Each Defendant knew or should have known that the other Defendants were manufacturing and selling to the military dioxin contaminated Agent Orange herbicides for use in Vietnam during the period 1961 and 1972.

65. Each Defendant knew or should have known that the Agent Orange herbicides being supplied by other defendants to the military for use in Vietnam were dangerous to human health.

66. Each Defendant knew or should have known that the other Defendants failed to warn the Government as to the

health hazards associated with the use of their products and that the other Defendants had also failed to share with the Government what they knew or should have

CLAIMS UNDER FRAUD AND MISREPRESENTATION

73. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

74. Each Defendant knew its product was hazardous to human health and contaminated. Each Defendant knew that the other Defendants' herbicides were hazardous and contaminated with dioxin. None of the Defendants warned the uninformed, less expert, military, or informed it either of the toxicity of the herbicides or of the dioxin contamination and the means of its avoidance or elimination.

75. The Defendants instead falsely and fraudulently represented to the United States Government Officials, conspired and acted in concert secretly and persistently to deceive the military and other governmental agencies about the matters hereinbefore alleged through misrepresentations, suppression and withholding of information and other schemes.

76. The Defendants knew that each other's herbicides were dangerous to human health and contaminated with dioxin; that each other's products constituted a breach of duty to warn, and that each was negligent in the design and production of the Agent Orange herbicides being supplied to the government or use in Vietnam and that exposure to such herbicides could and would cause injuries to the Plaintiff.

77. The Defendants concurrently, with their conspiracy of concealment and failure to warn the military as hereinbefore alleged, misrepresented the safety of their herbicides to the military and other Government agencies. Despite its extensive knowledge of health hazards, a Defendants, Dow Chemical Company, misrepresented to the United States military that they had been manufacturing 2,4-D and 2,4,5-T for over ten years and to the best of their

knowledge, none of the workmen in their factories have shown any ill effects as a result of working with these chemicals.

78. During the years 1966 and 1967, at times when all Defendants were selling dioxin contaminated herbicides to the military, they formed a Joint Industry Task Force, under the auspices of the National Agricultural Chemicals Association, an organization owned, operated, managed and controlled by the chemical industry whose purpose was to declare Defendant's Agent orange herbicides to be toxicologically safe. During the period of its existence, the Defendants' Task Force misrepresented to and deceived the Government concerning the nature and the extent of the toxicological data as to hazards which was locked within the Defendants' confidential files.

79. The Defendants and each of them knew of health hazards associated with exposure to such herbicides and each of them during the period in question either made affirmative statements misrepresenting material facts concerning such hazards or willfully did not disclose such material facts by conscious and willful omission.

80. By reason of the Defendants' such misrepresentations, the military and the Government were lulled into a belief that the Defendants' Agent Orange herbicides were safe to human health, and the military was prevented from taking the actions described in the above Paragraphs.

81. The Agent Orange herbicides manufactured by the Defendants were not produced in accordance with military specifications set forth in their Government contracts.

82. The Government contracts, pursuant to which the Defendants manufactured their Agent Orange herbicides, did not order, request, or put limitations on any permissible level of the toxic contaminant dioxin. The herbicides produced by the Defendants were generally similar except that they contained varying degrees of the toxic contaminant dioxin.

The Defendants jointly controlled all of the manufacturing processes used in the production of the Agent Orange herbicides supplied to the military.

83. Each of the Defendants' products was defective and dangerous to human health, especially in view of the presence of the toxic contaminant dioxin.

84. By reason of the foregoing, each Defendant is individually, jointly and severally liable for the injuries suffered by the Plaintiff and is responsible for and must pay all special, general, compensatory and punitive damages.

CLAIMS FOR PUNITIVE DAMAGES

85. The Plaintiff adopts, repeats, reiterates and realleges each and every allegation contained in the above Paragraphs.

86. Each Defendant knew or had reason to know not only that its conduct and the other Defendants' conducts created an unreasonable risk of harm to the Plaintiff but also that such harm was substantially certain to occur. Nevertheless, each Defendant proceeded with its conduct in reckless or conscious disregard of such consequences to the Plaintiff.

87. As actual and proximate results, the Plaintiff suffered the injuries complained thereof, and is entitled to punitive damages, in addition to special, general, and compensatory damages.

88. Wherefore, the Plaintiff demands judgment of the "corporate Defendants" THE DOW CHEMICAL COMPANY, MONSANTO CO., HERCULES INCORPORATES, T-H AGRICULTURE & NUTRITION COMPANY, OCCIDENTAL CHEMICAL CORPORATION, UNIROYAL, INC., and HARCROS CHEMICALS, INC. AND DOES 1 THROUGH 100, for the following relief:

a. Judgment in such sums as this Court and jury shall find in favor of the Plaintiff as shall fully, adequately and completely compensate him for all usual and customary elements of damage

awardable in cases of personal injuries, both general and special, including but not limited to physical pain and mental suffering, past, present and future, the reasonable and necessary costs of medical and hospital services and treatments, past, present and future, loss of earnings, disabilities, disfigurements, loss of society, consortium, services and companionship, and all other recognized losses, costs and damages incurred by the Plaintiff, his wife, his family and next of kin with direct and derivative claims;

b. Judgment in favor of the Plaintiff and for his punitive damages in an amount to be determined by the Court and jury of sufficient magnitude to adequately punish Defendants and each of them, jointly and severally, by reason of their willful and wrongful conduct and the great magnitude of damages which it has wrought;

c. Together with such other and further relief as to this Court shall seem just and proper under the circumstances, plus interest, reasonable counsel fees and the costs and disbursements of this action.

Respectfully submitted,

Dated: 9/17/98

/s/ Mark R. Cuker
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[FILED Dec. 29, 2001]

For further information contact:
Deborah Greenspan, Special Master 202-962-9283

Deadline for Application to Agent Orange Payment Program Extended

Brooklyn, New York, December 29, 1994 -

United States District Court Judge Jack B. Weinstein today ordered an extension of the deadline for Vietnam Veterans to file applications to the Agent Orange Veteran Payment Program, the program established to distribute a portion of the proceeds of the Agent Orange Settlement Fund. The Payment Program will now accept all applications submitted with a postmark date of January 17, 1995. Applications must be submitted to P.O. Box 110, Hartford, CT, 06104. To obtain an application, veterans should contact the Payment Program at 1-800-225-4712. The Claims Administrator has expanded the number of telephone lines and operators to accommodate incoming calls and has extended the hours of operation through the end of December from 8 am. until 12 midnight.

The Payment Program was established by Court order in 1985, and commenced operations in 198[illegible] after the conclusion of appeals. The Program had originally been scheduled to conclude its operations as of December 31, 1994. That deadline had been widely publicized both through direct communications to the class and various informational materials distributed to the print and radio media, veterans groups and various public agencies, both throughout the operation of the Program and more recently during 1994. Nevertheless, the Court has concluded that due to the fact that a number of applications were submitted during the last weeks of the Program and due to the fact that a number of inquiries were received by the Payment Program in the last week of 1994, the deadline should be extended to

permit those who have only recently decided to apply for benefits to submit their application materials.

The Agent Orange Payment Program is a benefits program established in 1985 solely to distribute the proceeds of the Agent Orange Settlement Fund. It has no relationship to programs operated by the Department of Veterans' Affairs or programs operated by other governmental agencies. Pursuant to statute and regulation, veterans may continue to apply to the Department of Veterans Affairs for various benefits offered to certain Vietnam veterans claiming exposure to Agent Orange. Veterans interested in such programs should contact their local Department of Veterans Affairs office. The National Veterans Legal Services Program, a Program established by the Agent Orange Settlement Fund, has published a "Self-Help Guide on Agent Orange". Vietnam veterans and their families may obtain that guide free of charge by writing to NVLSP, 2001 S Street, N.W., Suite 610, Washington, D.C. 20009.

The Agent Orange Class Assistance Program, the Program established to distribute another portion of the Agent Orange Settlement Fund for the benefit of the families and children of Vietnam veterans will continue operations through the middle of 1996.

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re Agent Orange
Product Liability Litigation

MDL 381
[Filed: Dec. 22, 1994]

Order

In accordance with previous Orders of this Court, the Agent Orange Veteran Payment Program is scheduled to accept for processing all applications submitted to that Program postmarked December 31, 1994, and to deny as untimely any applications postmarked after that date. This deadline was publicized in all communications to class members and in releases issued to the media and to veterans organizations and other public service agencies since the order establishing the Program in 1985. The class was further notified of this deadline in direct communications to individual applicants to the Program and through the media and veterans organizations during 1994. Nevertheless, during the last week of 1994, the Claims Administrator of the Payment Program has received substantial requests for application materials from class members who had not previously sought to contact the Payment Program. The Payment Program has also received a substantially greater volume of inquiries than expected and although the Claims Administrator has increased its staff and the number of incoming telephone lines, the Claims Administrator has advised that a number of individual callers have been unable to reach the Program as the year end approaches in order to request an application kit.

In light of these circumstances, the Court has concluded that the deadline for submission of applications forms should be extended for a modest period of time to permit those who

have only recently decided to apply to the Program to submit their application materials. It therefore Ordered that the deadline for submission of applications to the Agent Orange Veteran Payment Program shall be extended so that the Program shall accept for processing all applications submitted with a postmark dated on or before January 17, 1995.

So Ordered.

Dated: December 29, 1994

/s/ Jack B. Weinstein
Jack B. Weinstein
United States District
Judge

[Jack B. Weinstein letterhead]

[handwriting: "Sample"]
[stamp: Sep 11, 1998]

September 4, 1998

Mrs. [redacted]
[redacted] Avenue
[redacted]

RE: MDL 381 Agent Orange Veteran Payment Program John Stanton, Jr. - Deceased Veteran

Dear Mrs. [redacted]:

I have your letter postmarked August 19, 1998. The Agent Orange Settlement Fund distribution program about which you inquired has ended and the Fund has been fully allocated.

If you feel that your husband's difficulties were related to the use of Agent Orange, I suggest that you read the enclosed Self-Help Guide and consider applying for benefits from the Department of Veteran Affairs (VA). The Guide contains a list of those who provide representation before the VA. You may wish to contact the authors of the Self-Help Guide at the address listed on the back cover if your husband was a Vietnam veteran who suffered from a disease the VA recognizes as related to Agent Orange (these diseases are listed in the enclosed Guide) or if you are a surviving family member of a Vietnam veteran who died from one of these diseases. They should be able to provide you with further advice about entitlement to VA benefits.

Please accept my best wishes for the future.

Sincerely yours,

/s/ Jack B. Weinstein
Jack B. Weinstein
Senior United States
District Judge

Enc.
F&D A.O.
CC: Special Master

For further information contact:
Deborah Greenspan —202-962-9283
Dennis Rhoades —202-289-6173

FOR IMMEDIATE RELEASE

United States District Court Announces Plan for Terminating the Operations of the Agent Orange Settlement Fund

August 10, 1994, Brooklyn, N.Y.—United States District Court Judge Jack B. Weinstein today announced the plan for concluding the distribution activities of the Agent Orange Settlement Fund. Based on that plan, the Agent Orange Settlement Fund will accept applications for payment from individual veterans and survivors of deceased veterans through December 31, 1994. The Settlement Fund will continue to fund grant programs of agencies providing specified services for Vietnam veterans until June, 1996.

The Agent Orange Settlement Fund was created by the settlement in May of 1984 of the Agent Orange Product Liability Litigation, a class action lawsuit brought by Vietnam veterans and their families against the chemical companies that manufactured certain herbicides used by the United States Armed Forces during the Vietnam War. The action was settled for the aggregate sum of $180 million. Distribution of the Settlement Fund assets began in 1989, after the conclusion of all appeals to the settlement.

The Court established two programs to distribute the Fund to and for the benefit of Vietnam veterans in the United States. The Agent Orange Veteran Payment Program was established to provide cash compensation to totally disabled veterans and to survivors of deceased veterans. Since its inception, the Payment Program has distributed approximately $163 million (including principal and earnings) to over 37,500 veterans and survivors. At the time the Payment Program concludes, it is expected to have

distributed approximately $181 million to over 42,000 class members.

The Agent Orange Class Assistance Program was established to provide grant awards to organizations providing services for the benefit of Vietnam veterans and their families. The goal of the Class Assistance Program was to provide monies to fulfill service needs of the Vietnam veteran community not being met by existing service networks. The emphasis of the Class Assistance Program is on providing monies for programs of benefit to the children of Vietnam veterans and on creating a national network of assistance and informational programs. Since it began its grant-making activities, the Class Assistance Program has distributed grants totalling $57.7 million to 84 different agencies operating in all 50 states plus Washington, D.C. and Puerto Rico. The various service programs supported by these grants have provided direct benefits for an estimated 180,000 veterans and families of veterans. By the time it concludes, the Class Assistance Program will have distributed a total of $70 million in grants.

The monies allocated to the Payment Program and the Assistance Program will be distributed for the benefit of the plaintiff class members. No monies will be returned to the chemical companies or retained by the Court for any purpose. Accordingly, by the end of 1996, all settlement monies, including all earnings of the Settlement Fund should be fully disbursed. It is anticipated that by the time of its conclusion, the Settlement Fund will have distributed, in total, approximately $269.8 million consisting of $181 million in cash payments through the Payment Program, $70 million in grant awards through the Class Assistance program, $5 million to the trusts established in Australia and New Zealand and $13.8 million in fees to plaintiffs' attorneys. By the time the Fund is fully disbursed, administrative costs incurred in distributing and managing the Fund's assets are expected to equal approximately 9 percent of the amount distributed.

The Agent Orange Veteran Payment Program will accept for processing all completed applications submitted with a postmark of December 31, 1994. All applications submitted timely will be reviewed and considered for payment. To obtain an application or information about the Program, veterans may call toll free 1-800-225-4712 (from 8 a.m. to 6 p.m. Eastern Time). Class members may also write to the Payment Program at P.O. Box 110, Hartford, CT 06104. The Payment Program is expected to complete the processing of all applications received by the deadline no later than June 1995. The Payment Program may have a need to contact individuals who have in the past received payment from the Payment Program. Any such individuals should contact the Payment Program if they have moved.

The plan for terminating the distribution of the Settlement Fund calls for the creation of a permanent archive of the records of the Payment Program and the Class Assistance Program. It is the recommendation of the Court-appointed Board of Advisors of both Programs (consisting of Vietnam veterans) that the information collected during the operation of these programs should be preserved and stored in a manner that will permit access to both class members and the public, as appropriate. The information collected provides a wealth of knowledge about the Vietnam veteran population that may prove beneficial to the Vietnam veteran community.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE "AGENT ORANGE" PRODUCTS LIABILITY LITIGATION

DOCKET NO. 381

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, personally came and appeared :

DANIEL RAYMOND STEPHENSON

Daniel Raymond Stephenson, a person of the full age of majority, residing at Lafayette, Louisiana, who, being first duly sworn by me, did depose and state that:

1. I was unaware that I had been harmed by dioxin compounds to which I was exposed during the Vietnam War until after I was diagnosed with multiple myloma on February 19, 1998.

2. I was not aware of the existence of a class action lawsuit on behalf of Vietnam veterans exposed to "Agent Orange" until after I contacted an attorney to discuss this matter in early 1999.

3. I have never received any notice of the pendency of a class action lawsuit on behalf of Vietnam veterans exposed to "Agent Orange" either by direct mail or by publication of notice in print, radio or television media.

4. I have never received any notice of a settlement of a class action on behalf of Vietnam veterans exposed to "Agent Orange" either before court approval of said settlement or afterward. I was in no way advised of the effect said settlement would have on my rights to bring a claim [2] in

the future. I was in no way advised of my right to object to the terms of said settlement. I was in no way advised that I was a member of said class action or of my right to opt out of said class action. Only after I contacted an attorney in connection with this matter in early 1999 did I become aware of the existence of such a settlement.

/s/ Daniel Raymond Stephenson
DANIEL RAYMOND STEPHENSON

Sworn to and Subscribed before
me on this 21st day of May, 1999.

/s/ Gail [N.?] Miller
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK X

MICHAEL F. RYAN, et al.,

Plaintiffs,

-against- 79 CV 747 (JBW)

DOW CHEMICAL COMPANY, et al.

Defendants. X

In re

"AGENT ORANGE" MDL NO. 381

Product Liability Litigation X

JOE ISAACSON, et al.

Plaintiffs,

-against- Civ. No. 98-6383 (JBW)

DOW CHEMICAL COMPANY, et al.

Defendants. X

DANIEL RAYMOND STEPHENSON,

Plaintiffs,

-against- Civ. No. 99-3056 (JBW)

DOW CHEMICAL COMPANY, et al.

Defendants. X

NOTICE OF MOTION FOR DISMISSAL WITH PREJUDICE

Please take notice that on the 13th day of December, 1999 at 10:00 a.m. in the motion part of this Court to be held in the United States Courthouse for the Eastern District of New York, Defendants The Dow Chemical Company, Monsanto Company, Hercules Incorporated, Occidental Chemical Corp., Ultramar Diamond Shamrock Corp., Maxus Energy Corp., Chemical Land Holdings, Inc., T-H Agriculture & Nutrition Co., Inc., Thompson Hayward Chemical Co., Harcros Chemicals, Inc., and Uniroyal, Inc., C.D.U. Holding, Inc., Uniroyal Chemical Company will move this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an Order dismissing this action against the defendants with prejudice.

The basis for this motion is set forth in the accompanying Affidavit of Steven Brock, dated October 12, 1999 and exhibits attached thereto, and the accompanying Memorandum of Law. No prior request for the foregoing relief has been made. Accordingly, defendants' motion for dismissal with prejudice should be granted.

Dated: Uniondale, New York
October 12, 1999

Respectfully submitted,
RIVKIN, RADLER & KREMER
EAB Plaza
Uniondale, New York 11556
(516) 357-3000

By: /s/ Steven Brock
Steven Brock (SB9877)
Philip D. Nykamp

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK X

MICHAEL F. RYAN, et al.,

Plaintiffs,

-against- 79 CV 747 (JBW)

DOW CHEMICAL COMPANY, et al.

Defendants. X

In re

"AGENT ORANGE" MDL NO. 381

Product Liability Litigation X

JOE ISAACSON, et al.

Plaintiffs,

-against- Civ. No. 98-6383 (JBW)

DOW CHEMICAL COMPANY, et al.

Defendants. X

DANIEL RAYMOND STEPHENSON,

Plaintiffs,

-against- Civ. No. 99-3056 (JBW)

DOW CHEMICAL COMPANY, et al.

Defendants. X

AFFIDAVIT OF STEVEN BROCK IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

STATE OF NEW YORK)
: SS.
COUNTY OF NASSAU)

1. Steven Brock, being duly sworn, deposes and says as follows:

I am a partner with Rivkin, Radler, and Kremer, attorneys for defendant The Dow Chemical Company, and am familiar with the proceedings in this action and the matters set forth in this affidavit. I am duly admitted to practice before the United States District Court for the Eastern District of New York. I make this affidavit in support of defendants' motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing with prejudice the claims alleged in *Isaacson v. Dow Chemical Co.* and *Stephenson v. Dow Chemical Co.* by the veteran plaintiffs and their family members. The affidavits and exhibits attached hereto demonstrate that plaintiffs are members of the Agent Orange class, which includes persons whose injuries were not manifest at the time of the settlement. Accordingly, the Court should dismiss their claims on the ground that they are barred by this Court's judgment of dismissal of the class action and order enforcing the Agent Orange Settlement Agreement. *In re Agent Orange Product Liab. Lit.*, 996 F.2d 1425, (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994).

2. Attached hereto as "Exhibit 1" is a true and correct copy of the Civil Action Complaint captioned *Joe Isaacson and Phyllis Lisa Isaacson, his wife v. Dow Chemical Company, et al, No.* OCN-L-2415-98 (N.J. Sup. Ct.), filed on July 17, 1998.

3. Attached hereto as "Exhibit 2" is a true and correct copy of Brief in Support of Plaintiffs' Motion to Remand, filed on September 28, 1998 in *Joe Isaacson and Phyllis Lisa Isaacson, his wife v. Dow Chemical Company, et al,* Civ. No. 3-98-03988 (D.N.J.).

4. Attached hereto as "Exhibit 3" are true and correct copies of an Opinion and Order of Judge Anne E. Thompson, entered on December 7, 1998 in *Joe Isaacson and Phyllis Lisa Isaacson, his wife v. Dow Chemical Company, et al,* Civ. No. 3-98-03988 (D.N.J.) (AET), denying plaintiff's motion to remand.

5. Attached hereto as "Exhibit 4" is a true and correct copy of the Transfer Order, dated February 3, 1999, which transferred *Joe Isaacson and Phyllis Lisa Isaacson, his wife v. Dow Chemical Company, et al,* to MDL-381.

6. Attached hereto as "Exhibit 5" is a true and correct copy of the Complaint For Damages in *Daniel Raymond Stephenson, et al. v. Dow Chemical Company, et al.,* No. CV99-0296 (W.D. La.), filed on February 17, 1999.

7. Attached hereto as "Exhibit 6" is a true and correct copy of the Transfer Order, dated April 12, 1999, which transferred *Daniel Raymond Stephenson, et al. v. Dow Chemical Company, et al.* to MDL-381.

8. Attached hereto as "Exhibit 7" is a true and correct copy of the Final Report of the Special Master on the Distribution of the Agent Orange Settlement Fund, dated September 1997.

9. Attached hereto as "Exhibit 8" is a true and correct copy of an Order in *Ryan v. Dow Chemical Co. et al.,* signed by Judge Jack B. Weinstein, dated April 11, 1994.

10. Attached hereto as "Exhibit 9" is a true and correct copy of *Addington v. Agent Orange Veterans Payment Program,* 1997 U.S. App. Lexis 39372 (2d Cir. November 24, 1997) (summary order).

11. Attached hereto as "Exhibit 10" is a true and correct copy of *Gough v. Agent Orange Settlement Fund,* 104 F.3d 353, 1996 U.S. App. Lexis 29000 (2d Cir. November 5, 1996) (Table).

/s/ Steven Brock
Steven Brock

Sworn to before me this
12th day of October, 1999

Notary Public

[Excerpts of attachments to Affidavit of Steven Brock in Support of Defendants' Motion to Dismiss]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

[Filed: Feb. 17, 1999]

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON AND EMILY ELIZABETH STEPHENSON Plaintiffs VERSUS DOW CHEMICAL COMPANY AND MONSANTO COMPANY Defendants	CIVIL ACTION NO.: CV99-0296 L-O SECTION: Judge Putnam MAGISTRATE: Judge Methvin

COMPLAINT FOR DAMAGES

NOW INTO COURT, come plaintiffs, Daniel Raymond Stephenson, Susan Stephenson, Daniel Anthony Stephenson, and Emily Elizabeth Stephenson, who aver the following:

NATURE OF CASE

I. Defendants have negligently produced and manufactured an unreasonably dangerous product and placed it into the stream of commerce. Through the joint and combined

negligence and/or gross negligence of Dow Chemical and Monsanto, through their acts and/or failures to act, plaintiffs were exposed to hazardous, toxic and carcinogenic substances which, upon information and belief, included but were not limited to, herbicides that contained 2,3,7,8 tetrachlorodibenzo-p-dioxin (e.g. TCDD or dioxin), thought to be one of the most toxic substances known to man.

JURISDICTION AND VENUE

II.

This Court has jurisdiction over this matter because this is a claim by residents of the State of Louisiana, against Defendants that are foreign corporations. Diversity exists between the Plaintiffs and the Defendants and the amount in controversy exceeds $75,000.00.

PARTIES

III.

Plaintiffs

A. Daniel Raymond Stephenson is a person of the full age of majority, domiciled in the State of Louisiana. Due to his exposure to the carcinogenic dioxin chemical commonly known as "Agent Orange," he has suffered injury including costs of medical treatment, loss of wages and income, mental and emotional suffering, humiliation and frustration, and many other economic, physical, and emotional losses, including loss of consortium, and other damages to be proven during the trial.

B. Susan Stephenson is a person of the full age of majority, domiciled in the State of Louisiana. Plaintiff has suffered a loss of society and comfort, mental and emotional suffering, and many other economic, physical, and emotional losses, including loss of consortium, and other damages to be proven at trial.

C. Daniel Anthony Stephenson is a person of the full age of majority, domiciled in the State of Texas.

Plaintiff has suffered a loss of society and comfort, mental and emotional suffering, and loss of consortium with his father.

D. Emily Elizabeth Stephenson is a person of the full age of majority, domiciled in the State of Louisiana Plaintiff has suffered a loss of society and comfort, mental and emotional suffering, and loss of consortium with her father.

IV.

Defendants:

The parties named and sued as the Defendants herein are as follows:

A. Dow Chemical Company is a Delaware corporation. Dow is headquartered in Midland, Michigan, with a principal place of business located at Baton Rouge, Louisiana, that manufactures, advertises and sell chemicals throughout the United States, including the Western District of Louisiana.

B. Monsanto Company is a Delaware corporation. The company manufactures chemical and agricultural products, pharmaceuticals, industrial process controls, and consumer products at sites located throughout the country, including the Western District of Louisiana. It does business worldwide and maintains its corporate headquarters in St. Louis, Missouri.

Hereinafter, Plaintiffs refer to Defendants as "Chemical Companies."

V.

Plaintiffs assert that during the Vietnam war, Mr. Stephenson was a helicopter pilot for the U.S. armed forces. From 1965 until 1966, Mr. Stephenson, served on the ground in the jungles of Vietnam and from 1969 to 1970, served as a Helicopter pilot, flying various missions into many different landing zones in Vietnam. Plaintiff was regularly in contact with the product commonly referred to as Agent Orange, a

form of phenoxy herbicide that contained 2,3,7,8 tetrachlorodibenzo-p-dioxin (e.g. TCDD or dioxin).

VI.

On February 19, 1998, Daniel Raymond Stephenson was diagnosed with multiple myeloma, a cancer of the bone marrow which is nearly always terminal. In August, 1998, Mr. Stephenson, on the advice of his physicians, underwent a bone marrow transplant. Because of the advanced nature of the disease and the injuries from dioxin exposure, Mr. Stephenson will be required to undergo another bone marrow transplant in April, 1999.

VII.

The Plaintiff realleges and incorporates herein, as if fully set forth, each and every allegation contained in paragraphs 1 through 6 hereof, and further alleges:

VIII.

The Defendants had a duty to the Plaintiff to produce and sell a reasonably safe product in design and manufacture, and to warn of the hazardous and unreasonably dangerous nature of Agent Orange and to warn of the dangerous and toxic nature of dioxin products.

IX.

The Defendants breached their duty of reasonable care to the Plaintiff by the following acts and omissions:

A. Failure to design, manufacture, and sell Agent Orange that was not carcinogenic and/or a product that did not contain unreasonably dangerous levels of dioxin;

B. Failure to warn the Plaintiff of the dangerous and toxic nature of Agent Orange, when they knew or reasonably should have known of dioxin's hazardous qualities, dangerous and toxic nature;

C. Otherwise failing to exercise proper care under the circumstances, due to knowledge of the health hazards

and health risks of handling the chemical and inhaling Agent Orange mist.

X.

As a direct and proximate result of the carelessness, negligence, fault, silence, omission, and inaction of the Defendants, the Plaintiff has suffered reasonable and foreseeable damages in an amount to be proven at trial including, without limitation, physical and economic injury, and severe emotional distress. Each of the Defendants, therefore, are liable to the Plaintiff jointly, severally, and *in solido* for all general, special, and equitable relief to which the Plaintiff is entitled by law.

XI.

The Plaintiff realleges and incorporates herein, as if fully set forth, each and every allegation contained in paragraphs 1 through 11, hereof, and further alleges:

XII.

The Defendants breached their warranties by offering for sale, and selling as not dangerous, the Chemicals Companies' dioxin products that were lethal and dangerous.

XIII.

The Defendants' breach of their express warranties of fitness for a particular use has caused the Plaintiff to become sick and ill. The Defendants, therefore, are liable to the Plaintiff jointly, severally, and *in solido* for all general, special, and equitable relief to which the Plaintiff is entitled by law.

XIV.

The Defendants impliedly warranted that their dioxin products, which they designed, manufactured, distributed, and sold to the U.S. government were merchantable for their ordinary use, that the Agent Orange in the defoliant was not unreasonably dangerous nor toxic.

XV.

The Defendants' defoliant purchased and consumed by agents of the United States was dangerous, toxic, unmerchantable, and therefore unfit for use when sold, and subjected the Plaintiff to danger. Therefore, the Defendants breached the implied warranty of merchantability at the time the Defendants' dioxin products were sold to United States military in that the Defendants' defoliant dioxin products were not fit for their ordinary purposes.

XVI.

As a direct and proximate result of the Defendants' breach of the implied warranty of merchantability, Plaintiff Stephenson is ill and disease stricken. The Defendants, therefore, are liable to the Plaintiff jointly, severally, and *in solido* for all general, special, and equitable relief to which the Plaintiff is entitled by law.

XVII.

The Plaintiffs realleges and incorporates herein, as if fully set forth, each and every allegation contained in paragraphs 1 through 16, above, and further allege against the Chemical Companies:

XVIII.

At all relevant times herein, the Chemical Companies were engaged in the business of manufacturing and selling their dioxin products for agricultural sale to consumers knowing the dangerous and toxic nature of dioxin. The Chemical Companies manufactured dioxin, failed to warn of its carcinogenic products, and then distributed and sold this product to United States residents, commercial farmers and the U.S. military despite the dangerous and toxic nature of Agent Orange.

XIX.

The Chemical Companies' dioxin was expected to and did reach the Plaintiff without substantial change in their

condition as manufactured, distributed and sold by the Chemical Companies.

XX.

The Plaintiff inhaled defoliating chemicals that were intended to be used in defoliating the jungles in Vietnam. The product harmed Plaintiff Daniel Raymond Stephenson by causing and/or subjecting the Plaintiff to become sick after contracting cancer. Owing to this sickness, plaintiff has required a bone marrow transplant and other surgeries to live.

XXI.

The Plaintiff was not aware of, and reasonably could not have discovered, the carcinogenic nature of dioxin and how dangerous it was, the Chemical Companies' manipulation of their knowledge of the dangers it posed, and the Chemical Companies' intent to enter this product into the stream of commerce, because Agent Orange was marketed and sold to the United States military without adequate warnings of dioxin's dangers to humankind or of its inherently dangerous nature.

XXII.

The Chemical Companies' dioxin defoliation products, containing levels of carcinogenic compounds, caused or subjected the Plaintiff Daniel Raymond Stephenson to become sick and contract disease upon exposure, and therefore constitutes a product unreasonably dangerous for normal use due to its defective design, defective manufacture, and the Chemical Companies' inadequate warnings to the Plaintiff.

XXIII.

The Chemical Companies, therefore, are strictly liable to the Plaintiffs jointly, severally, and *in solido* for all general, special, and equitable relief to which the Plaintiffs are entitled by law.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray for judgment against the Defendants, and each of them, jointly, severally, and in solido as follows:

1. For compensatory damages as alleged herein;

2. For medical monitoring, whether denominated as damages or in the form of equitable relief;

3. For reasonable attorneys' fees;

4. For pre-judgment interest from the date of filing of this suit;

5. For all costs of this proceeding; and,

6. For all general, special, and equitable relief to which the Plaintiffs are entitled by law.

Respectfully submitted this 15th day of February, 1998.

/s/ Daniel Raymond Stephenson
Daniel Raymond Stephenson
IN PROPER PERSON

/s/ Susan Stephenson
Susan Stephenson
IN PROPER PERSON

/s/ Daniel Anthony Stephenson
Daniel Anthony Stephenson
IN PROPER PERSON

/s/ Emily Elizabeth Stephenson
Emily Elizabeth Stephenson
IN PROPER PERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[FILED Sept. 29, 1997]

In re	:	
	:	
"AGENT ORANGE"	:	MDL No. 381
	:	
PRODUCT LIABILITY	:	
LITIGATION	:	

FINAL REPORT OF THE SPECIAL MASTER ON THE DISTRIBUTION OF THE AGENT ORANGE SETTLEMENT FUND

September 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re	:	
	:	
"AGENT ORANGE"	:	MDL No. 381
	:	
PRODUCT LIABILITY LITIGATION	:	

ORDERED REGARDING SUBMISSION AND ACCEPTANCE OF THE FINAL REPORT OF THE SPECIAL MASTER ON THE DISTRIBUTION OF THE AGENT ORANGE SETTLEMENT FUND

The Special Master has submitted to this Court the Final Report of the Special Master on the Distribution of the Agent Orange Settlement Fund, dated September 24, 1997. In the

Report, the Special Master advises that the distribution activities of the Agent Orange Settlement Fund have concluded and that all Settlement Fund assets have been expended and committed through the programs established by this Court for distribution of the Fund. The Report notes that certain minor administrative activities necessary to conclude finally the activities of the Fund are ongoing but that such activities will not affect in any way the prior disposition of Settlement Fund assets in accordance with the plan for distribution of the Fund. The Report documents the manner in which the Settlement Fund assets were distributed and expended throughout the duration of the Settlement Fund from May 1954 (the date of the settlement) through the present and includes an accounting of the revenues and expenses of the Fund. Thus, the Report constitutes the final report on the disposition of the fund assets subject to the minor activities and functions remaining to be completed as described in the Report.

The Report of the Special Master is accepted and approved for filing and docketing and is confirmed as the Final Report on the Distribution of the Agent Orange Settlement Fund.

The Clerk of the Court is directed to file and docket this Report and to forward a copy of the Report to the Clerk of the Court for the United States Court of Appeals for the Second Circuit for transmission to the Chief Judge of that Court.

SO ORDERED.

Date: September 26, 1997

/s/ Jack B. Weinstein
Jack B. Weinstein
United States District Judge

PART I : OVERVIEW: SETTLEMENT, DISTRIBUTION PLAN AND IMPLEMENTATION STRUCTURE

The Agent Orange Settlement Fund was created by the resolution of a class action litigation commenced in 1979 by and on behalf of Vietnam veterans and their family members. The class complaint alleged that the veterans had been injured by exposure to herbicides used by United States Armed Forces as defoliants during the Vietnam War. (For purposes of simplicity, the various herbicides used are referred to collectively by the term "Agent Orange" — the name by which one of those herbicides was identified during the war.) The defendants in the action consisted of various chemical companies that had manufactured the herbicides for use by the Armed Forces of the United States government. At the time of its commencement, the Agent Orange litigation was reported to be the largest mass tort litigation ever filed.

The District Court initially certified the action as a class proceeding in 1980. *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980), *modified*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.). *cert. denied*, 465 U.S. 1067 (1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). The class as certified was defined as "those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5-trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984 directly or derivatively injured as a result of the exposure." 100 F.R.D. at 729. The Court estimated that the class included

between 2 and 3 million veterans and 8 to 10 million family members.

Notice of the class was distributed during March 1984 (after the Second Circuit vacated the stay it had entered in conjunction with a petition for mandamus that had been filed challenging the class). The class members were given the opportunity to withdraw from the class, and by the end of the opt-out period, 2,440 class members had in fact elected to withdraw from the class. (A separate class was certified as a mandatory non-opt-out class on the issue of punitive damages, and class members were prohibited from withdrawing from that class.)

The Court scheduled trial to commence in May of 1984 using initially ten plaintiffs asserting claims characteristic of the allegations of the class. On May 7, 1984 — the day jury selection was to commence — the parties agreed to settle the class litigation for the aggregate sum of $180 million. The defendants paid the aggregate settlement amount including accrued interest into the Court-established account between May 1984 and January 1985.

The settlement agreement did not provide any specific guidelines as to the distribution of the Settlement Fund to the plaintiff class. Rather, the agreement set forth only general requirements and specified that the Settlement Fund was to be maintained and administered by the Court and remain under the Court's continuous jurisdiction, control and supervision. The Court was granted the authority to retain auditors, special masters, disbursing agents, consultants and counsel and to enter into contracts.

The Court held extensive hearings at different locations around the country in order to solicit the views of the class members as to the fairness of the settlement and the appropriate mechanism for distributing the Settlement Fund assets. The Court heard the public statements of hundreds of witnesses and class members, and it reviewed hundreds of letters and written submissions from class members detailing

their views regarding how the Settlement Fund should be used to benefit the class. At the conclusion of the hearings and after the review of the comments of the class, the Court issued an extensive opinion and order analyzing the comments of the class members, evaluating the legal positions of the parties and assessing the terms of the settlement. Based on that analysis, the Court preliminarily approved the settlement as fair, reasonable and adequate in accordance with applicable federal rules but reserved a final decision on approval of the settlement pending the development of a plan for distributing the assets of the settlement.[2]

The Court then requested the submission of plans for the distribution of the Settlement Fund assets and requested that the Special Masters previously appointed — Kenneth R. Feinberg and Richard J. Davis — assist in coordinating the consideration of distribution options and managing the investment of Settlement Fund assets.[3] In responding to the

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[2] The Court, in fact, approved the settlement on January 7, 1985 and reaffirmed that decision on June 18, 1985 based on information submitted regarding possible mechanisms for distribution. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp.1296, 1346 (E.D.N.Y. 1985), *modified*, 818 F.2d 226 (2d Cir. 1987). The Court issued a Final Order and Judgment of Dismissal on July 9, 1985. *Ryan v. Dow Chem. Co.*, 618 F. Supp. 623 (E.D.N.Y. 1985).

[3] The Court initially appointed three Special Masters — Leonard Garment, Kenneth R. Feinberg and David I. Shapiro — to assist the parties in exploring options for settlement of the litigation. The Court subsequently appointed Richard J. Davis to assist the Court with management of the Settlement Fund assets and overall investment strategy regarding the Settlement Fund. Kenneth R. Feinberg continued to serve as Special Master with responsibility for oversight of the administration of the distribution plan until June 1993. At that point, the Court appointed the current Special Master, Deborah Greenspan, to supervise the distribution of the Settlement Fund; to manage appeals and to oversee the closure of Settlement Fund activities.

Court's request, the Special Masters obtained the advice and assistance of a 29-member group of Vietnam-era veterans.

The development of a fair mechanism for distributing the Settlement Fund assets to the class was a significant challenge: first, as discussed in the Court's Opinion reviewing the settlement terms, the plaintiffs lacked adequate proof to establish a causal link between the exposure to herbicides and the multitude of illness and injuries claimed. *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 782 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). As the various injuries alleged (with perhaps one exception) appeared in the general population and were attributable to various causes or were of unknown etiology, it was impossible to determine which class members among those who might suffer from one or more of a large group of claimed diseases, including peripheral and central neuropathy, liver disorders, gastrointestinal conditions and all tumors and metabolic problems, ought to receive a payment from the Settlement Fund based on the presence of a particular disease. Second, given the vast size of the class, it seemed unreasonable to simply distribute the money on some sort of pro-rata basis, such as by providing an equal distribution to each class member. Indeed, depending on the rate of claims filings, class members might obtain payments of as little as $5 or $10 using such a distribution system. Third, use of the Settlement Fund assets to provide some general benefit to the class — for example, medical research — seemed duplicative of the undertakings of governmental entities and also seemed to ignore the real need of some class members for a concrete response to their claims. The task, therefore, was to develop a plan for distributing the Settlement Fund assets that would target the funds in a meaningful way and, to the extent possible, augment the benefit to the class by leveraging the funds.

Ultimately, after additional formal hearings, the Court adopted (with slight revision) a plan of distribution prepared

by the Court-appointed Special Master taking into account the input received from the various veteran advisors. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985), *modified*, 818 F.2d 179 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234, *and modified*, 689 F. Supp. 1250 (1988). The plan presented by the Special Master specified two mechanisms for the distribution of Settlement Fund assets to the class members residing in the United States. First, the plan recommended the distribution of cash payments to individual class members, including both veterans and families of veterans, based generally on the severity of the veteran's medical condition or death (along with other factors). The objective of this cash payment program was to provide prompt financial benefits to those class members most in need. Second, the plan recommended the leveraging of Settlement Fund assets for the benefit of the class through the establishment of a grant-making "foundation." The purpose of the grant-making foundation was to provide initial funding for organizations to provide services and benefits specifically targeted to the needs of the class, including, particularly, the children of the veterans. The intent of the grant-making program was twofold: first, to provide immediate funding to address the un-met needs of the class members, and, second, to educate — through example — existing social service organizations and other grant-making entities and foundations as to the particular needs of the Vietnam veteran community and the class members in particular. The hope was that through education and provision of directed funding the "foundation" established to distribute Settlement Fund assets would become and would create a lasting legacy for the Vietnam veteran community by institutionalizing a services support network directed at the needs of the population of Vietnam veterans and their families.

Upon approval of the plan of distribution, the Court commenced the procedures for establishing the administrative systems necessary to implement that plan.

The Court established a request-for-proposal process for the selection of a claims administration facility and for the selection of investment managers to advise and assist in the proper investment of Settlement Fund assets. The request-for-proposal process yielded 16 applications from groups and entities interested in providing claims services and 39 applications from financial institutions and other entities interested in providing investment and depository services. The request-for-proposal process incorporated detailed review by the Court, the Special Masters and the Advisory Board of Vietnam veterans. The procedures employed for the selection of contractors to provide the requisite management services for the Court are described below in the sections outlining the operation of the distribution programs.

Prior to the completion of implementation procedures, appeals as to certain aspects of the Court's decisions regarding the settlement were lodged. As a result, the United States Court of Appeals for the Second Circuit stayed implementation of the distribution plan pending the resolution of appeals. Finally, on April 21, 1987, the Court's decisions certifying the class, finding the settlement to be fair, reasonable and adequate, and adopting the distribution plan (with some modification) were affirmed by the United States Court of Appeals for the Second Circuit.[4] *In re*

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[4] The modification to the distribution plan mandated by the Court of Appeals concerned only that portion of the distribution plan providing for a "foundation" to establish grant programs for the benefit of the class. The distribution plan as originally approved by the District Court contemplated an independent foundation that would operate with Court guidelines but that ultimately could become a wholly-independent entity with fund-raising capability that could exist in perpetuity. The Court of Appeals rejected the concept of an independent entity, and while endorsing the concept of a grant-making program, it required that any distribution of assets be directly controlled by the Court. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) ("We are unwilling for several reasons to

"Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

Subsequently, on July 5, 1988, after the Supreme Court declined to review any aspect of the case, the Court issued an Opinion and Order specifying the final terms for distribution of the Settlement Fund assets. *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250 (E.D.N.Y. 1988) ("Final Distribution Opinion").

The Final Distribution Opinion adopted by the Court established the two mechanisms outlined above for the distribution of Settlement Fund assets to and for the benefit of the class members in the United States. First, the Court established the Agent Orange Veteran Payment Program. The function of this program was to distribute cash payments to certain individual class members. The concept defining the Payment Program was that a distribution plan for the settlement of a tort action should reflect traditional tort concepts in the sense that individuals should receive compensatory payments for their claimed injuries. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1410 (E.D.N.Y. 1985); *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250 (E.D.N.Y. 1988). The Program's guidelines, which are described more fully in Part II below, mandated the distribution of such payment to totally disabled Vietnam veterans and to the survivors of deceased Vietnam veterans. Because this program was to be the mechanism by which veteran class members would receive traditional compensatory-type payments, the bulk of the Settlement Fund assets were allocated to this program. Second, the court established the Agent Orange Class Assistance Program. This program replaced the original concept of a foundation

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permit the distribution of any settlement proceeds to a largely independent foundation.").

for the benefit of Vietnam veterans and their families with a grant-making program operating for a finite period under Court supervision. The mandate of the Class Assistance Program was to leverage remaining Settlement Fund assets most effectively by providing grants to institutions and entities for the purpose of providing services (including assistance in accessing other benefits and information) to Vietnam veterans and their families. The Class Assistance Program is described in detail in Part III below. In addition, the Court allocated Settlement Fund assets to class members in New Zealand and Australia based on the percentage of Armed Forces in Vietnam from those two countries and allocated a portion of the Settlement Fund for attorneys' fees based on an extensive review of attorneys' fees petitions. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985) (Memorandum and Order on Attorneys' Fees As Modified and Final Judgment), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987); *and*, 611 F. Supp. 1452 (E.D.N.Y. 1985), *rev'd*, 818 F.2d, *cert. denied*, 484 U.S. 926 (1987).

In the Final Distribution Opinion the Settlement Fund assets (including earnings) were allocated to the above-described programs and purposes. In accordance with that allocation, funds aggregating $243,575,9[illegible]6[5] were transferred to specific programs during the period July 14, 1988 to November 22, 1988 approximately as follows:

$ 172,775,853 to the Agent Orange Veteran Payment Program

$ 42,000,000 to the Agent Orange Class Assistance Program

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[5] The aggregate amount and allocation are recorded in the Agent Orange Settlement Fund Report and Financial Statements of Price Waterhouse LLP, Attachment H.

$ 10,000,000 retained for the Indemnity Fund[6]

$ 13,825,000 for fees of plaintiffs' attorneys

$ 4,500,000 for class members in Australia

$ 500,000 for class members in New Zealand.

Upon conclusion of the appellate process, the Court provided for the immediate implementation of the distribution plan in order to provide funds to class members as promptly as possible. The Payment Program commenced operations in July of 1988 (immediately after the issuance of the Court's Final Distribution Opinion regarding the distribution of the Settlement Fund) and began mailing of application forms to class members in November of 1988. The Class Assistance Program commenced operations in January of 1989 and began issuance of initial grants on March 30, 1989. A detailed chronology of the implementation of the distribution plan with respect to each "program" is contained in Parts II and III below.

The programs established by the Court to distribute Settlement Fund assets were supervised directly by the Court and remained under the Court's control and jurisdiction at all times. The Court appointed various contractors and individuals to provide necessary processing, management and investment services to accomplish the distribution of the Settlement Fund's assets as described more fully below. The Court was assisted throughout the implementation of the distribution plan by two Advisory Boards of Vietnam veterans. The Advisory Board assisting specifically with the implementation of the Payment Program consisted of five members: Charles T. Hagel, Vincent J. Martin, Jr., John L. McElrath, Donna-Marie Boulay, and Albert A. Dandridge,

[6] The Indemnity Fund (of $10 million) was mandated by the settlement agreement and was to be paid to or for the benefit of the settling defendants in the event that any class members obtained verdicts against the defendants in any subsequent state court litigation.

III. The Advisory Board assisting with the Class Assistance Program consisted initially of ten Members and at the conclusion of the Program had nine Members. The Class Assistance Program Board Members and their dates of service follow: Rev. Robert Certain (1989-1991), Steve Champlin (1989-1990), Mary Lou Keener (1989-1993), Professor Gary E. May (1989-1996), Frank McCarthy (1989-1996), The Honorable Matt Railey (1989-1996), Dr. Oscar Salvatierra (1989-1996), Solomon B. Watson, IV (1989-1996), Helen R. Phillips (1994-1996), Diane Carlson Evans (1994-1996), Ron Gardner (1989-1996), and Charles T. Hagel (1989-1996). The Board members provided invaluable insights and assistance, and all served and expended countless hours without any compensation.

PART II: THE AGENT ORANGE VETERAN PAYMENT PROGRAM

A. Mandate/Outline of Eligibility Guidelines: Distribution Guidelines Established by the Court.

The basic outline and guidelines for the distribution of Settlement Fund assets through the Payment Program are contained in the Distribution Opinion issued by the Court on May 28, 1985 and the Final Distribution Opinion issued by the Court on July 5, 1988. Detailed administration guidelines and specific claims-processing protocols were developed under the Court's supervision during the implementation of the claims-processing facility. The more detailed administrative guidelines are described in this Report or are set forth in various attachments to the Report.

The Payment Program was established to provide the mechanism for distributing cash payments to a portion of the class members. The Court-adopted distribution plan was premised on the theory that a substantial portion of the Settlement Fund assets should be focused on the veterans within the class and, more specifically, on those veterans who were most injured or in need of assistance. Concluding

that there was no realistic basis upon which to distribute the Settlement Fund based on the type of disease alleged or the nature of the alleged herbicide exposure, the Court approved the distribution of Settlement Fund assets based on a finding of total disability or death. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1400 (E.D.N.Y. 1985) ("Because no substantial scientific evidence supports a finding of causal connection between Agent Orange exposure and any specific disease except chloracne, and because of the near impossibility of proving that any particular plaintiff's condition was caused by Agent Orange, dividing the fund among those with particular diseases is unjustified."). By using the death and disability criteria for the focused distribution of a significant portion of the Settlement Fund assets, the distribution plan channeled assets in a meaningful way to those class members with the most severe conditions. (In contrast, any program under which assets of the Settlement Fund would be distributed on a pro-rata basis to class members would have resulted in de minimis payments to individuals, and any plan that would have distributed assets based on some assumed (but unproven) causal connection between exposure and certain diseases would have distributed potentially significant amounts of money to relatively fewer claimants on a purely speculative basis, in the Court's view.) The use of disability and death as the key factors for distinguishing among class member claimants allowed for ease of administration, an equitable allocation of assets to the class as a whole and objective eligibility criteria that are both understandable and relatively simple to apply fairly among various claimants.

Under the guidelines established by the Court, to be eligible for compensation from the Payment Program the class members were required to establish the following: first, that the veteran served in or near Vietnam between 1961 and 1972 as a member of the United States Armed Forces (as mandated by the class definition); second, that the class member applicant was either a totally-disabled Vietnam

veteran or the survivor of a deceased Vietnam veteran who served in the United States Armed Forces in Vietnam during the requisite period; third, that based on the circumstances of the veteran's service (including location of service and particular experiences during service) the veteran met a test of probable exposure to herbicides; fourth, that the death or disability was not caused by a traumatic or accidental occurrence; and, fifth, that the death or disability occurred before December 31, 1994 (which was the Court-established closure date for the Payment Program).

The Court-adopted distribution plan provided for an eligibility and payout period equivalent to ten years from the date of settlement (i.e., from May 1984 when the action was settled until December 31, 1994). Under the distribution plan any class member who manifested an eligible condition during that period and filed an application was permitted to obtain a distribution from the Settlement Fund. The ten-year period selected reflected a balancing of the interest in prompt distribution of Settlement Fund assets to the class and the desire to provide benefits for a reasonable length of time after the last possible exposure to herbicides. The Program closure date in effect was 22 years after the last exposure date based on the class definition.

In order to assure appropriate and equivalent treatment of claims, the distribution plan defined the requirements of death and disability with reference to standard criteria. Veteran class members were eligible for a disability payment if they could demonstrate a total, permanent disability as defined by the Social Security Act. The veteran need not be eligible for or receiving Social Security disability benefits, but the claims administration facility was required to review the medical documentation to determine the presence of a disability consistent with that definition. Any disability was eligible except those caused by an accidental, traumatic or self-inflicted injury. In other words, disabilities caused by various physical and mental ailments except those attributed to a specific accidental or traumatic cause (such as, for

example, a work-related injury) were considered eligible for payment. Similarly, survivors of veterans were eligible for payment provided the death was not caused by accident, trauma or self-infliction. By excluding accidental and traumatic deaths and injuries the eligibility criteria eliminated deaths and disabilities that could clearly be attributed to a source other than herbicide exposure and thereby preserved funds for other members of the class.

Recognizing that requiring class members to demonstrate that they had been exposed to herbicides might prove quite burdensome, the Court adopted a mechanism to determine a probability of exposure to herbicides in order to assure compliance with the class definition in distributing cash payments to class members. Under the Court's exposure test, claims were reviewed using a computerized exposure evaluation system, under which the veteran's location of service in Vietnam was compared to the documented locations of herbicide spraying. This objective system was implemented through the development of a computer database that incorporated extensive information about the location of military units and the locations of herbicide spray missions and applied certain Court-approved parameters for determining a probability of exposure. More specifically, the computerized evaluation system matched service locations (obtained from the claimant's exposure form and from the documented locations of military units) to herbicide spray locations.[7] To be considered a match, the veteran's service did not have to occur at the exact time and place of spraying. Rather, the system took into account *past* herbicide spraying in an area up to fifteen kilometers from

[7] Detailed information about troop locations and movements was obtained from a variety of sources, including military records and data correlated from claimants. Troop locations were considered to cover a large area in applying the exposure review to account for the fact that various members of a unit might be widely dispersed.

the veteran's general unit location and assigned exposure "scores" when the locations matched. The exposure evaluation system added up monthly exposure "scores." The "scores" were calculated taking into account both time and distance from herbicide spraying so that a veteran who moved into an area in which spraying had previously occurred would receive a "score" for that location. Thus, as the time between spraying and the veteran's location in an area increased, or as distance increased, the exposure "score" decreased. Generally, with the exception of veterans who served very late or very early in the war, those who served in Marine and Army combat units satisfied the exposure eligibility criterion. Those who served in the off-shore Navy or at air bases outside the area of herbicide use were most commonly found not to be exposed under this system. The exposure evaluation system is described in detail in the Final Report of the Exposure Evaluation Unit at Attachment B.

Payment amounts were varied under the guidelines based on the date of onset of the veteran's total disability or the date of the veteran's death. Thus, under the payment guidelines, those class member veterans with disabilities that commenced earlier received greater compensation than those with disabilities that commenced later. As the disability is by definition a permanent condition, the effect of that payment variation is to provide greater compensation to those whose disability would likely last longer and whose disability likely commenced at an earlier age. The payment formula adopted by the Court assigned compensatory amounts for each month of disability commencing with January 1, 1970 and ending on December 31, 1994.

The Payment Program eligibility criteria also specified certain guidelines based on the age of the veteran at the time of disability or death and further contained certain filing deadlines by which class members were required to submit their claim materials. The Program did not authorize payment for deaths or disabilities occurring after the veteran reached age 60.

Payment levels were established initially based on projections regarding the likely volume and characteristics of claims. Based upon a review of preliminary claim forms and Social Security disability data, the Special Master developed initial anticipated claim payment levels. Final payment levels were determined after a review of the initial group of claims filed. Originally, in the Final Distribution Opinion the Court had anticipated that payments to eligible disabled veterans might be based on an assigned amount per year of disability. The Court noted in that Opinion, however, that claims payment formulas might need to be adjusted to account for claims experience. Once the initial batch of claims was analyzed, the Court was able to finalize a payment formula based on actuarial projections regarding the anticipated number and nature of unreviewed and future claims. Based on the analysis conducted, the Court was able to establish a payment amount based on each month of disability, which permitted more particularized calculation of benefits and a simpler administrative process. The calculation formula finally adopted by the Court applied a monthly disability payment of $42.67 for each month of disability during the Program term.[8] This payment formula was maintained throughout the entire period of distribution of the Settlement Fund.

Payments to disabled veterans eligible to receive a disability award under the Payment Program guidelines were originally issued in annual installments. Each year the claimant was required to re-certify the disability, i.e., confirm its continued existence, in order to receive the next installment payment. As described below, this installment payment system was modified at a later stage in the Program.

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[8] The final payment formula approved by the Court resulted in a maximum aggregate inability award of $12,800 and a maximum survivor payment of $3,400.

The Payment Program guidelines further defined the eligible survivors to consist of spouses and minor children of veterans. As described below, the definition of eligible survivor was modified to incorporate other family members.

B. Modifications to the Plan of Distribution.

During the course of implementation of the Payment Program, the Court issued periodic orders modifying eligibility and claim-filing guidelines. These modifications were based on an evaluation of claims experience and were adopted in order to respond to claimants' needs and to distribute more efficiently the assets of the Settlement Fund. Following is a summary of the modifications made to specific distribution guidelines:

1. Modification of Deadline for Submission of Applications. Initially, the Distribution Opinion required that all applications must have been filed by a specific deadline (either March 1, 1989 or 120 days after occurrence of the eligible disability or death). The modification eliminated the filing deadline and permitted the filing of applications at any time during the duration of the Payment Program. *Order Regarding Modifications to the Agent Orange Veteran Payment Program*, November 15, 1989.

2. Modification of Definition of Eligible Survivors. Initially, the Distribution Opinion provided that compensation for deceased veterans be provided only to surviving spouses and dependent children. The Court modified that guideline to permit the distribution of survivor payments to parents, adult children and siblings in addition to spouses and dependent children. *Order Regarding Modifications to the Agent Orange Veteran Payment Program*, November 15, 1989.

3. Modification of Installment Payments. The Distribution Opinion required that payments to eligible disabled veterans would be made in annual installments. The Court directed the provision of a partial lump-sum

payment to enable eligible veterans to receive a greater portion of their total award earlier. This modification was deemed possible based on an actuarial analysis of claims filings. *Order Regarding Modifications to the Agent Orange Veteran Payment Program*, November 15, 1989.

4. Provision of Lump-Sum Payments. The distribution plan, as noted, originally called for the payment of disability awards in installments and further permitted for the adjustment of awards in the event that claims experience demonstrated that payment levels should either be increased or decreased. During the course of the Program implementation, the Special Master continued to monitor the payment and claims experience to determine whether any adjustment was required. During the initial years of the implementation of the Payment Program, actuarial analyses were conducted every quarter. These analyses reviewed projected claims volume and character as compared to claims filings and actual claim statistics, and they determined whether, based on that information, the Settlement Fund's assets would be sufficient to pay all anticipated claims at the payment levels established initially by the Court. In later years of the Payment Program, these actuarial analyses were supplemented by further estimates conducted by Price Waterhouse. In 1993 the Special Master reported to the Court that actuarial projections indicated that the Payment Program account would have sufficient assets to pay all claims filed by the publicized closure date at the payment levels initially established by the Court. In light of that report, the Court directed that all claims should thereafter be paid on a lump-sum basis. Commencing in September 1993 all Payment Program participants who had previously received an installment payment were sent a lump-sum payment constituting the unpaid remainder of their total award. Any applicant

approved for payment after that date received the entire award in a lump-sum payment. *Order*, June 10, 1993.

5. Extension of Program. Subsequent to the elimination of the filing deadline explained above, the Court granted one additional extension permitting the filing of applications beyond the deadline established in the November 15, 1989 Order. On December 29, 1994 the Court authorized a brief extension of the deadline for filing applications for those class members who had not previously filed application kits. As the Program deadline of December 31, 1994 approached, the Claims Administrator was inundated with a significant volume of requests for application kits from class members. The Claims Administrator reported that it was unable to respond to all the requests in time to permit the actual filing of application kits by the December 31, 1994 deadline. Based on that report, the Court authorized a brief extension — until January 17, 1995 — for class members to obtain and file application kits. The Payment Program extension and the procedures developed to address the volume of claims filings in response to the extension are addressed below. *Order*, December 29, 1994.

The Orders specifying modifications to the eligibility criteria are contained at Attachment A.

C. Implementation of Payment Program and Distribution Plan: Selection of Contractors/Oversight.

In order to implement the distribution plan, it was necessary for the Court to appoint various contractors to provide the actual claims-processing, audit and review services required to effect distribution of the Settlement Fund assets to the class members. The Court-appointed Special Masters conducted public bid processes in order to obtain a pool of appropriate candidates capable of providing the necessary services in the most cost efficient manner.

To select a claims administrator and investment managers to implement the distribution plan, the Special Masters developed a formal Request for Proposal ("RFP") with the advice and assistance of the Advisory Board of veterans and various consultants experienced in securing and providing claims-processing services. The Special Masters advertised the availability of the Request for Proposal and provided the RFP to the 232 entities and individuals who requested the document. By the end of the RFP process, the Special Masters had received ten proposals to

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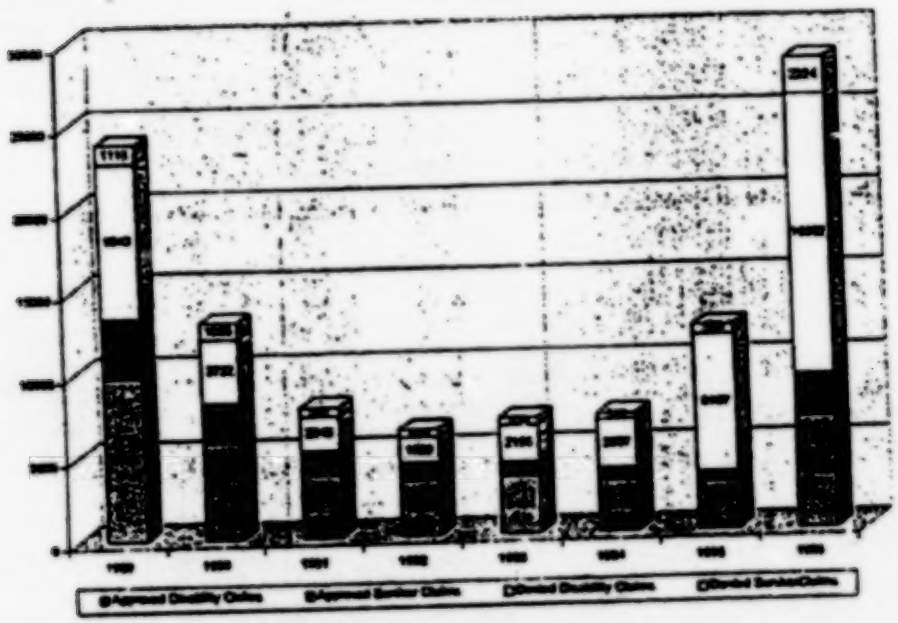

3. Geographic Distribution of Applicants.

Claims were submitted from each state in the United States plus the District of Columbia and Puerto Rico. A small portion of claims were submitted by individuals residing outside the United States (including Guam and the

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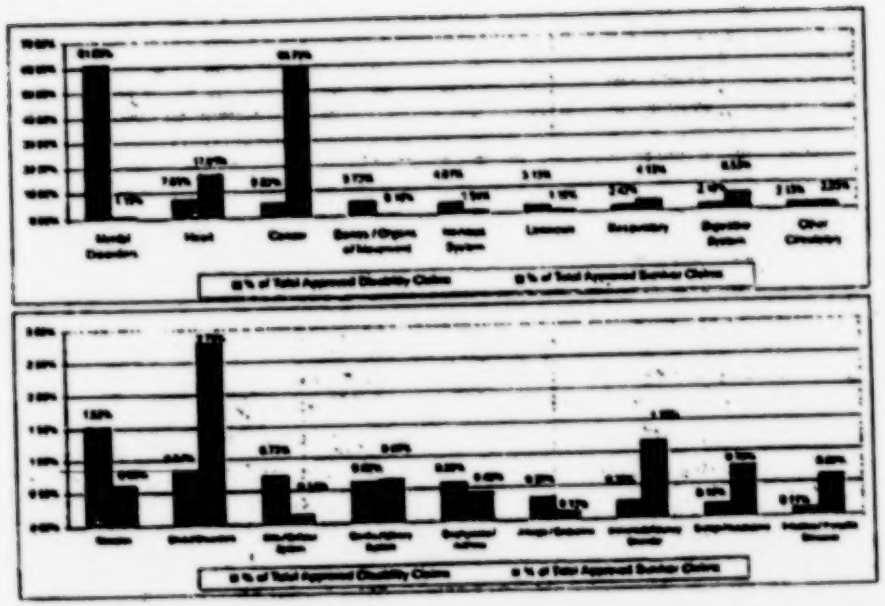
U.S. Virgin Islands). The states with the highest number of claimants were Texas (7,162 claims), California (7,106 claims), and Florida (5,924 claims). In addition to those three states, five other states accounted for over 4,000 claims each: Georgia, North Carolina, New York, Ohio and Pennsylvania. The states with the smallest number of claimants were North Dakota (169 claims), Vermont (169 claims) and Wyoming (177 claims), and the District of Columbia was included in this category as well (161 claims). The approval and denial rates vary in each state, and there does not appear to be any discernable pattern. A breakdown of all claims by state of the claimants' residences is contained in the Final Report of the Claims Administrator.

4. Causes of Disability and Death Among Veteran Applicants.

The Claims Administrator tracked the general cause of the disability or death among the approved claims and, where discernable, among the denied claims. The Claims Administrator's statistics indicate 19 different causes of death or disability among claimants. The most common cause of disability among approved disability claimants was mental disorder (including post traumatic stress disorder). Heart disease, cancer and diseases of the bones and organs of movement were the next most common causes of disability among approved disability claims. The most common causes of death resulting in approved survivor claims were cancer, heart disease and diseases of the digestive system — with cancer accounting for 59 percent of the approved survivor claims.

Following is a graph showing the breakdown of approved claims (on a percentage basis) by the cause of disability or death.



(Percentage = number of claims approved for particular cause in each category (disability/survivor) divided by the number of approved claims in each category (disability/survivor).)

5. **Demographic Information.**

The applicant population was predominately male, but, according to the Claims Administrator's records, 150 female veterans applied for benefits from the Program.

The Payment Program and Claims Administrator made efforts to publicize the Program among incarcerated veterans through veterans organizations and publications that could reach the prison population. Ultimately, 177 incarcerated veterans did apply for benefits.

The average age at onset of the condition qualifying for payment varied only slightly: for the five most common conditions resulting in a disability payment, the average age of onset was between 41 and 46. For the five most common conditions resulting in death, the average age of death again ranged between 41 and 46.

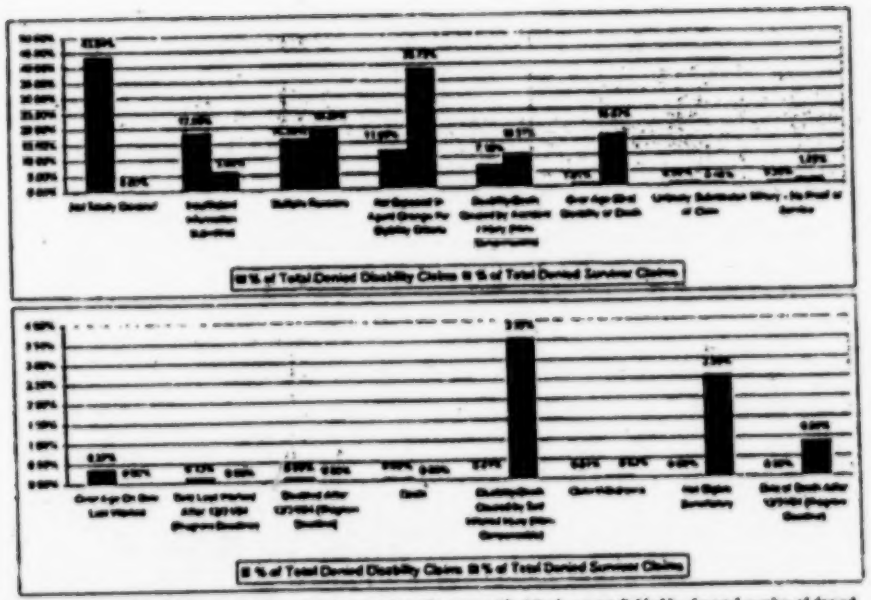
6. **Basis for Ineligibility.**

Claims could be denied for a variety of reasons including failure to meet any of the required eligibility criteria, failure to submit information sufficient to evaluate the claim, and

failure to file the claim by the Court-mandated deadline. For disability claims, by far the most common reason for denial of a claim was a finding by the Claims Administrator that the applicant had not demonstrated a total disability. A total of 44 percent of the disability claims denied were denied based on the applicants' failure to meet the disability requirement. A determination that the applicant failed to meet the disability requirement could be based on evidence that the applicant continued substantial employment, or presentation of medical evidence showing an illness that was not totally disabling. A total of 7 percent of the disability claims denied were denied based on a finding that the disability was in fact caused by an accident or traumatic injury. Thirteen percent of the disability denials resulted from a finding that the veteran did not satisfy the Court-approved standard for demonstrating a probability of exposure to herbicides based on the circumstances and location of service. Most commonly, a denial based on exposure would occur where the veteran served outside the country (such as on an off-shore Naval vessel) or served very late or very early in the war when herbicide spraying was either confined to a limited area or had been discontinued. Very few claims were denied as untimely: a total of 275 disability claims (less than 1 percent of all disability claim denials) were disallowed based on failure to file by the required deadline.

The most common basis for denial of a survivor claim was the failure to satisfy the Court-approved standard for exposure. A total of 39 percent of the survivor claims denied (13 percent of all survivor claims) were denied based on the exposure criterion. A relatively substantial number of claims (1,109 or 16 percent of all survivor claim denials) were denied on the ground that the veteran was over age 60 at the time of death. A large portion of claims (1,303 or 19 percent of survivor denials) were denied for multiple reasons.

Following is a graph showing the basis for denial of claims for the two categories of claims (disability and survivor).



(Percentage – number of claims denied for particular cause in each category (disability/survivor) divided by the total number of denied claims in each category (disability/survivor))

7. **Disbursements.**

The Payment Program has issued payments totaling $196,580,450[13] to class members. Of this amount approximately 85 percent was distributed to disabled veterans and the remaining 15 percent was distributed to survivors of deceased veterans. Sixty-five percent of the total amount paid to disability claimants was paid to class members whose disability was based on a mental disorder. Seven percent of the total paid to disability claimants was paid to class members whose disability was based on cancer. By contrast 59 percent of the amount paid to survivor claimants in the aggregate was paid to survivors of veterans who died from cancer. The states/areas

* * * *

[13] An additional $14,634.66 was distributed in response to appeals after the preparation of financial statements and therefore is not included in the aggregate breakdown.

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CHRONOLOGY OF EVENTS REGARDING DISTRIBUTION OF THE SETTLEMENT FUND

May 7, 1984	Settlement Reached
September 25, 1984	Court Issues Preliminary Approval of Settlement
May 28, 1985	Court Adopts Distribution Plan
August 27, 1986	Implementation of Distribution Stayed by Appeals
April 21, 1987	Settlement and Distribution Plan Approved on Appeal
June 30, 1988	Supreme Court Denies Certiorari on Last Petition
July 5, 1988	Court Issues Final Distribution Opinion Authorizing Implementation of Distribution Plan
July 8, 1988	Claims Administration Facility Begins Implementation
September 1988	Claims Administrator Distributes Initial Letter to Class
November 1988	Claims Administrator Distributes Application Kits for Payment Program
January 1989	Court Appoints Executive Director for Class Assistance Program
February 1989	Claims Administrator Begins Distribution of Payments Under Payment Program
March 1989	Class Assistance Program issues Initial Grants
November 1989	Court Modifies Certain Aspects of Payment Program
September 1993	Payment Program Issues Lump-Sum Payments

May 1994	Class Assistance Program Holds Symposium on Veterans Issues
December 1994	Payment Program Extends Deadline for Claim Submission
September 1996	Claims Administrator Completes Processing of Payment Program Claims

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MICHAEL F. RYAN, et al.,

Plaintiffs,

-against-

Index No. 79
CIV. 747 (JBW)

DOW CHEMICAL CO., MONSANTO CO., HERCULES INC., T. H. AGRICULTURE & NUTRITION CO., INC., DIAMOND SHAMROCK CHEMICALS CO., UNIROYAL, INC., and THOMPSON CHEMICALS CORP.,

Defendants.

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In re,

"AGENT ORANGE"

MDL No. 381
(JBW)

Product Liability Litigation

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ORDER

The Dow Chemical Company has brought on an order to show cause asking that the $10 million reserve for indemnification of defendants established in the Agent Orange class action Settlement Agreement be released to the Agent Orange Class Assistance Program for the benefit of the class in accordance with the court's discretion. Based on the supporting Affidavit of Steven Brock dated April 27, 1994, the decisions of this Court and the Court of Appeals in *In re Agent Orange Product Liability Litigation*, 781 F. Supp. 902 (E.D.N.Y. 1991), *aff'd*, 996 F. Supp. 1425 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994), and the full

record in the ongoing indemnity proceedings in MDL No.381, the Court concludes that the indemnify reserve should immediately be released.

Indemnification of defendants for state court Agent Orange judgments is no longer a realistic possibility. Those plaintiffs who originally opted out of the class have either had their claims dismissed or have opted back into the class. As to class members who did not timely opt out of the class, the Court of Appeals has affirmed that this Court retains jurisdiction to enforce the Settlement Agreement, including in particular its provisions barring relitigation by class members. Any further state court suits by class members will not result in state court judgments because removal and transfer to MDL No. 381 will continue to be available to defendants. The Court's retained jurisdiction to enforce the Settlement Agreement, decide questions of class membership, and enforce its injunction against relitigation will continue even after all settlement funds have been distributed.

While the $10 million fund for indemnification of defendants was to be held in reserve for twenty-five years, these changed circumstances make it appropriate for the Court to exercise the discretion which it has retained over the Settlement Fund to release the $10 million reserve to the Agent Orange Class Assistance Program. The release of the reserve will permit the Class Assistance Program to continue to provide efficient and effective assistance to class members until its funds are exhausted and its operations concluded. The Court continues to retain discretion over the Settlement Fund to make indemnification payments to defendants in the future in accordance with the Settlement Agreement to the extent that funds remain available and the Court determines that such indemnification payments would be in the interest of justice. Accordingly, it is hereby

ORDERED that the $10 million indemnity reserve provided for defendants in the Settlement Agreement be

immediately released to the Agent Orange Class Assistance Program.

/s/ Jack B. Weintstein
JACK B. WEINSTEIN

Dated: April 11, 1994

[Excerpts of attachments to Opposition of Plaintiff Joe Isaacson to Defendants' Motion to Dismiss]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[stamped - Plaintiff's Exhibit A]

In re "Agent Orange" Product Liability Litigation	MDL No. 381
JOE ISAACSON AND PHYLLIS LISA ISAACSON, h/w Plaintiffs, -against- DOW CHEMICAL COMPANY, et al., Defendants.	Civ. No. 98-6383 (JBW)
DANIEL RAYMOND STEPHENSON, Plaintiffs, -against- DOW CHEMICAL COMPANY, et al.,	Civ. No. 99-3056 (JBW)

Defendants

AFFIDAVIT OF JOE ISAACSON IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I, Joe Isaacson, being duly sworn, depose and say as follows:

1. I served in Vietnam and am informed and believe that I was exposed to phenoxy herbicides, including "Agent Orange," during my tour of duty in Vietnam from September 1968 to September 1969. Among the places that I served during this period was Phan Rang Air Force base.

2. After I returned from Vietnam, I paid little attention to whether or not I had been exposed to herbicides, including Agent Orange, while serving in Vietnam.

3. Before 1996, I was unaware that the cases of veterans who claimed to have been injured by these herbicides were consolidated into a single action in Brooklyn known as In re "Agent Orange" Product Liability Litigation nor was I aware of the existence of a class action lawsuit on behalf of veterans who were exposed to herbicides.

4. Before 1996, I never filed a lawsuit related to my exposure to herbicides in Vietnam, I did not consult with any attorneys regarding my exposure to herbicides in Vietnam, I never contacted the Veterans Administration or the Department of Veterans' Affairs regarding my herbicide exposure, I belonged to no veterans' organizations, and I was not aware (and am still not aware) of being listed on any "Agent Orange" registry.

5. I do not recall ever seeing, reading or hearing any notice of a class action for herbicide-exposed Vietnam veterans, whether by direct mail or by publication, either in print, on radio, or on television.

6. I do not recall ever receiving any notice of a class which included: "[T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides .... " If I had received this notice in 1983 or 1984, I would not have believed it to have included me. This is because it was not until 1996, when I was diagnosed with non-Hodgkin's lymphoma, that I believed that I had in any way been injured by exposure to 'Agent Orange or other phenoxy herbicides' while I was in Vietnam.

7. I do not recall ever receiving any notice of a settlement of a class action on behalf of Vietnam veterans exposed to 'Agent Orange and other phenoxy herbicides' at any time. Before 1996 I was never advised in any fashion as to what effect such a settlement might have on my rights to bring a claim in the future. Having not heard of such a settlement, before 1996 I certainly do not recall ever being advised of any rights to object to the terms of such a settlement or being told any particulars of the settlement, nor do I recall being advised of a right to opt out of either a class action or a class action settlement.

8. In 1996 I was employed as an assistant principal in a Middle School setting. In the late summer of 1996 I was diagnosed with non-Hodgkin's lymphoma. I am informed and believe that the Department of Veterans' Affairs has determined that my non-Hodgkin's lymphoma is connected to my service in Vietnam. Before being diagnosed with non-Hodgkin's lymphoma, I did not believe that I had suffered any injuries related to my exposure to Agent Orange and other phenoxy herbicides in Vietnam. I do believe that my non-Hodgkin's lymphoma is related to my exposure to phenoxy herbicides in Vietnam.

9. It was only after being diagnosed with non-Hodgkin's lymphoma that I became aware of the existence of a class action and a class action settlement on behalf of Vietnam

veterans which took place around 1984. I further became aware that at the time of my diagnosis neither I nor my heirs would be able to receive any funds from that particular settlement, because all settlement funds had been paid out without preparing for the fact that I and other veterans might get cancer from Agent Orange after 1994. I, therefore, have not received any payments from what I understand to have been called the Agent Orange Veterans' Payment Program.

10. I also am not aware of having received any benefits related to my Vietnam 'Agent Orange and phenoxy herbicide' exposure from any organization funded by what has been called the Agent Orange Class Assistance Program.

11. I therefore am not aware of having received any compensation in any form from any corporation that manufactured the phenoxy herbicides that I was exposed to which caused my cancer.

I verify under penalties of perjury that the foregoing is true and correct.

/s/ Joe Isaacson
Joe Isaacson

State of New Jersey, County of Ocean, Subscribed and sworn to before me on November 21, 1999 by Joe Isaacson.

Rose Janowski
November 21, 1999
[notary seal]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Stamp: Plaintiffs Exhibit B]

MICHAEL F. RYAN, et al, Plaintiffs, vs. DOW CHEMICAL COMPANY, et al., Defendants.	*	79 CV 747 (JBW)
In Re: "AGENT ORANGE" Product Liability Litigation	*	MDL No. 381
JOE ISAACSON, et al., Plaintiffs, vs. DOW CHEMICAL COMPANY, et al., Defendants.	*	Civ. No.: 98-6383 (JBW)

AFFIDAVIT OF LAURA WELCH

I, Laura S. Welch, with personal knowledge hereby declare and affirm under penalties of perjury the following:

1. My name is Laura Welch and I am over the age of eighteen years.

2. I am a medical doctor, certified in occupational and environmental medicine.

3. I have held faculty positions at the Albert Einstein School of Medicine, Yale University and George Washington

University. I have published over 50 peer reviewed articles or book chapters in the field of occupational and environmental medicine. (A true and correct copy of my curriculum vitae is attached hereto as Exhibit "A.")

4. I am familiar with the process by which the scientific and medical community and governmental and quasi-governmental agencies assess the questions about whether the exposure to a particular substance has adverse human health effects.

5. I have followed the opinions of the medical and scientific community regarding potential health effects to Viet Nam veterans of exposure to the phenoxy herbicides which were sprayed in Viet Nam, including the 2,4,5-T and 2,4-D combination known as "Agent Orange."

6. During the decade beginning 1975 through 1985, the scientific community tried to determine whether exposure to these chemicals led to adverse health effects in Viet Nam veterans. Much of this analysis relied upon occupational studies of herbicide sprayers and manufacturing workers.

7. At the time it was believed, based upon toxicological studies, that "dioxin," which was a contaminant of many of these herbicide combinations was a potent carcinogen. (See, for example, Kociba, R.J., D.G. Keyes, J.E. Beyer, R.M. Carreon, C.E. Wade, D.A. Dittenber, R.P. Kalnins, L.E. Frauson, C.N. Park, S.D. Barnard, R.A. Hummel, and C.G. Humiston " Results of a two-year chronic toxicity and oncogenicity study of 2,3,7,8-tetrachlorodibenze-p-dioxin in rats". Toxicity And Applied Pharmacology, 469: 279-303 (1978).)

8. However, during that time, there was insufficient data to evaluate fully the human health effects of such herbicide exposure. Because there was very little data and what existed was based on small sample sizes and limited exposure characterization, as is typical in the early stages of these kinds of inquiries, the data available for human effects left the question as to whether there were such health effects

inconclusive with the notable exception of skin condition called chloracne.

9. Before 1984, to the extent that there were any human cancers caused by these herbicide combinations, most of the studies in existence at the time suggested the possibility of a relationship to either soft-tissue sarcomas or non-Hodgkin's lymphomas. (See, for example: Ericksson, M., L. Hardell, N.O. Berg, T. Moller, and O. Axelson. "Case-control study on malignant mesenchymal tumors of the soft tissue and exposure to chemical substance." Lakartidningen 76: 3872-75, 1979; Ericksson, M., "Soft tissue sarcomas and exposure to chemical substances: A case referent study," British Journal of Industrial Medicine, 38: 27-33 (1981); Ericksson M., Hardell L., Berg N.O., Moller T., Axelson O., "Soft tissue sarcomas and exposure to chemical substances: a case reference study," Br. J. Indust. Med. 38: 27-33 (1981); Honchar, P.A and Halperin, W.E., "2,4,5-T, trichlorophenol, and soft tissue sarcoma." Lancet 1: 268-269 (1981); Johnson, F.E., Kugler, M. A., Brown, S.M., "Soft tissue sarcomas and chlorinated phenols," Lancet 2: 40 (1981); Fingerhut, M.A., Halperin, W.E., Honchar, P.A., Smith, A.B., Groth, D.H., and Russell, W.O., "An evaluation of reports of dioxin exposure and soft tissue sarcoma pathology among chemical workers in the United States," Scand. J. Work Environ. Health 10: 299-303 (1984); Fingerhut, M.A. and Halperin, W.E. "Dioxin exposure and sarcoma," J. of the Am. Med. Assn. (JAMA) 249: 3176-3177 (1983); Cantor, K.P. "Farming and Mortality from Non-Hodgkin's Lymphoma: a case-control study," Int. J. Cancer. 29: 239-247 (1982); Sarma PR, Jacobs, J. "Thoracic soft-tissue sarcoma in Vietnam veterans exposed to Agent Orange," New England J. Med 306 (18) 1109 (1982); Bishop, C.M. and Jones, A.H., "Non-Hodgkin Lymphoma of the Scalp in Workers exposed to Dioxins," Lancet 2: 369 (1981); Hardell, L., Sandstrom, A., "Case-control study: Soft tissue sarcomas and exposure to phenoxyactic acids or chlorophenols," Br. J. Cancer 39: 711-717 (1979); Hardell,

L., Erickson, M., Lenner, P., and Lundgren, E., "Malignant lymphoma and exposure to chemicals, especially organic solvents, chlorophenols and phenoxy acids: a case-control study," Br. J. Cancer 43: 169-176 (1981); Buesching, D.P. and Wollstadt, L., "Cancer Mortality among Farmers. JNCI 72: 503-504 (1984); Fingerhut, M.A., Halperin, W.E., Honchar, P.A., Smith, A.B., Groth, D.H., and Russell, W.O., "An evaluation of reports of dioxin exposure and soft tissue sarcoma pathology among chemical workers in the United States," Scand. J. Work Environ. Health 10: 299-303 (1984); Hardell, L., "Relation of soft-tissue sarcoma, malignant lymphoma and colon cancer to phenoxy acids, chlorophenols, and other Agents." Scand. J. Work Environ. Health 7: 119-130 (1981); Moses, M. and Selikoff, I.J. "Soft tissue sarcomas, phenoxy herbicides, and chlorinated phenols," Lancet 1:1370 (1981); and Ollsson, H. and Brandt, L., "Non-Hodgkin's lymphoma of the skin and occupational exposure to herbicides," The Lancet, p. 579, Sep. 12 (1981).)

10. However, though suggestive, these studies and reports were inadequate to come to scientific conclusions regarding the human carcinogencity of the phenoxy herbicides used in Viet Nam. The problems with the studies varied. For example, if the size of the group is small, a study can only detect a large increase in risk. If the exposure assessment is not adequate, misclassification of exposure can occur.

11. Subsequently, Pl 98-542 mandated the National Academy of Sciences to create a scientific review process that began with the National Academy of Sciences and outside expert panelists reviewing the large body of scientific literature in order to assess scientific knowledge regarding the health effects of the herbicides sprayed in Viet Nam.

12. The resulting report of the National Academy of Sciences' Institute of Medicine includes a rigorous peer reviewed investigation of all scientific data, weighing the strength and validity of such data. The results of this process

are reported in two reports entitled Veterans and Agent Orange, one dated 1994 and the other dated in 1996. Current information about this project and the drafts of the latest study are available on the Internet site of the National Academy of Sciences.

13. The conclusion of the reports of the Institute of Medicine of the National Academy of Sciences indicate that there are eleven diseases that have been concluded by the scientific literature to be causally related to phenoxy herbicide exposure. These different diseases are each discussed in the reports and the strength of the data regarding each disease is presented. Non-Hodgkin's lymphoma is in the category of those diseases for which the scientific literature has the strongest association between the disease and phenoxy herbicide exposure.

14. These reports show very powerfully that the scientific community today has a very much more advanced view regarding the diseases caused by phenoxy herbicide exposure than a decade ago. At the time that the original litigation in In RE: Agent Orange took, it was a credible scientific position to state that other than chloracne there were few, if any, diseases for which there was sufficient, widely accepted evidence in the scientific community, demonstrating that phenoxy herbicides were a causative agent. At this point, because we have much more information, the scientific view has reversed 180 degrees and there is a high degree of consensus that certain phenoxy herbicide exposures is related to cancer of particular types, such as non-Hodgkin's lymphoma and soft-tissue sarcomas, among others.

15. The development of knowledge decades after exposure is typical for diseases for which there is a latency period, including virtually all types of cancer. Because of the latency period that exists between exposure to a hazardous substance and the onset of cancer, it can take decades before health effects occur, and even longer before they are

observable in study populations. The concept of latency for carcinogenesis and the fact that this could take decades — often in excess of thirty years — has been known since well before 1984. For instance, there are many other such exposure-response relationships that took years to occur and even more years to become apparent because of latency periods, including the links between asbestos and mesothelioma, benzene and leukemia, and even tobacco and lung cancer.

_____

LAURA WELCH

District of Columbia, SS:

SUBSCRIBED and SWORN to before me this 22nd day of November, 1999.

_____

Notary Public

My Commission Expires: October 14, 2002 [notarial seal]

Curriculum Vitae

Laura Stewart Welch

PERSONAL DATA:

Office address: Section of Occupational and Environmental Medicine
Department of Medicine
The Washington Hospital Center
[illegible]10 Irving St, NW
Washington, D.C. 20010

Telephone: 202-877-5466

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Birthdate: November 27,1951
New York, New York

Citizenship: USA

Social Security 118-44-2896

EDUCATION:

BA with distinction, 1974, Swarthmore College, Swarthmore, PA

M.D.,1978, State University of New York at Stony Brook, Stony Brook, New York

Residency in Internal Medicine, 1978-1981, Montefiore Hospital, New York, New York

Professional Registration, Licenses

Licensure: District of Columbia

Certification: American Board of Internal Medicine (1981)
American Board of Preventive Medicine - Occupational Medicine (1990)

ACADEMIC APPOINTMENTS:

Adjunct Professor of Environmental and Occupational Health School of Public Health and Health Services, George Washington University	1997-present

Chair, Department of Environmental and Occupational Health School of Public Health and Health Services, George Washington University	1997
Professor of Medicine and Health Care Sciences The George Washington University School of Medicine	1995 - 1997
Associate Professor of Medicine and Health Care Sciences The George Washington University School of Medicine	1989 - 1995
Assistant Professor of Medicine The George Washington University School of Medicine	1985 - 1989
Assistant Professor of Health Care Sciences The George Washington University School of Medicine	1988 - 1989
Assistant Professor of Medicine Yale University School of Medicine	1982 - 1985
Instructor, Department of Medicine Montefiore Hospital, NY, NY	1981-1982
Instructor, Department of Community Medicine Albert Einstein College of Medicine, NY, NY	1981 - 1982
Chief Resident, Residency Program in Social Medicine Montefiore Hospital, NY, NY	1980 - 1981

Societies and honors:

Membership: Delta Omega Society
American Public Health Association

Society for Occupational and Environmental Health
Association of Occupational and Environmental Clinics

Fellowships: American College of Occupational and Environmental Medicine
American College of Physicians

Administrative appointments (intramural and extramural):

Chief, Section of Occupational & Environmental Medicine The Washington Hospital Center	1997-present
Director, Division of Occupational & Environmental Medicine The George Washington University School of Medicine	1988 - 1997
Director, Occupational Medicine Program The George Washington University School of Medicine	1985 -1988
Director, Occupational Health Clinics Metropolitan Washington Airports	1985 -1993
Medical Director, Employees Health Service The George Washington University Hospital	1985 - 1988
Co-director, Occupational Medicine Clinic Yale University School of Medicine	1982 - 1985
Medical Director, Occupational Medicine Clinic Montefiore Hospital, NY, NY	1981-1982
Governing Council. American Public Health Association	1984-1987

Action Board, American Public Health Association	1985 - 1987
Governing Council, Society for Occupational and Environmental Health	1986 - 1989
President, Association of Occupational and Environmental Clinics (AOEC)	1987-1991
Treasurer, AOEC	1991-1993
Chair, Quality Assurance Committee, AOEC	1993 - 1995
Member, Quality Assurance Committee, AOEC	1995 -present
Chairperson, Safety Committee, George Washington Hospital	1995 - 1997
Parliamentarian, George Washington University	1993-1997
Medical Center (GWUMC) Faculty Senate Quadrennial Review Committee, GWUMC	1992-3, 1996-7
Committee on the Status of Women, GWU	1996-7
Search Committee for Chair of the Department of Psychiatry	1996-7
Appointment and Promotions Committee, School of Medicine, George Washington University	1996-7
Appointment and Promotions Committee, School of Public Health, George Washington University	1996-7

Consulting and teaching (selected):

Medical Consultant, International Chemical	1982 -

Workers Union	1985
Ohio State Labor College - lecturer in Occupational Health	1983, 1984
Peer Review Committee, Centers for Disease Control studies of:	
(1) health effects of 2,4,7,8-TCDD (dioxin).	1985
(2) reproductive health effects of 2,4,7,8-TCDD	1987
(3) body burden study of 2,4,7,8,-TCDD	
Peer Review Committee, Love Canal Habitability Criteria Document for the EPA and New York State.	1986
Medical Consultant, Sheet Metal Occupational Health Institute	1985-present
Medical Consultant, Laborers International Union of North America (LIUNA)	1987 - 1992
Invited participant, Keystone Center Project on Occupational Disease Reporting	1987 - 1988
Consultant, National Institutes of Health	1988 - 1993

Occasional Reviewer for:
American Journal of Industrial Medicine
Journal of Occupational and Environmental Medicine
Environmental Research
American, Journal of Epidemiology
Journal of the American Medical Women's Association
Toxicology and Industrial Health

NIH Study Section for Occupational Safety and Health	1989
Member, Injury Control Research Centers	1999

review panel, CDC	
Editorial Board, *Environmental and Nutritional Interactions*	1992-present
Editorial Board, *The Guides Newsletter,* American Medical Assn.	1997-present
Editorial Board, *Official Disability Guidelines,* Work-Loss Institute	1997-present
Member of ergonomics task force, Occupational Safety and Health administration	1993-4
Member, National Occupational Research Agenda (NIOSH)	1997-present

Grants and Contracts (since 1990):

1) Investigation of Asbestos-Related Disease in Sheet Metal Workers Sheet Metal Occupational Health Institute. 1985 - present.
2) Mortality in Workers with Intermittent Asbestos Exposure: Investigation of Asbestos-Related Disease in Sheet Metal Workers. National Institute of Occupational Safety and Health (NIOSH), 1995-8.
3) Co Principal Investigator: Health and Safety Programs in Construction. CPWR/NIOSH 1995-1999.
4) Former Workers' Notification and Medical Screening: Hanford Building Trades. CPWR/Department of Energy (DOE). 1996-9
5) Former Workers' Notification and Medical Screening Oak Ridge Building Trades. CPWR/Department of Energy (DOE). 1996-9
6) Former Workers' Notification and Medical Screening. Savannah River Building Trades. CPWR/Department of Energy (DOE). 1997-9

7) Co Principal Investigator Work-related musculoskeletal disease in construction workers. CPWR/NIOSH 1992-1995.
8) Co Principal Investigator : Investigation of task variability among sheet metal workers. NIOSH 1994-6
9) Longitudinal surveillance of workers with hazardous exposures. Marine Spill Response Corporation. 1993-1996
10) Principal investigator: Chronic Bronchitis in Sheet Metal Workers. American Lung Association. 1989 - 1991.
11) Investigator of a Leukemia Cluster. Department of Health and Human Services. District of Columbia 1990.

Publications:

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Hunting KL, Welch LS, Nessel-Stephens L, Anderson J, and Mawadeku A. Surveillance of construction worker injuries: utility of trade specific analysis. Applied Occ Env Hyg 14:458-469 1999

Welch LS, Hunting KL, Weeks JL Fatal and Non-Fatal Injuries from Vessels Under Air Pressure in Construction. J Occ Env Med 41:100-104, 1999

Welch LS, Hunting KL, Schiffman A, Balmes J, Bresnitz E, Guidotti T, Lockey J, Mahelc W, Myo-Lwin T. Variability In The Classification Of Pneumonoconioses Using The 1980 International Labor Organization Classification System For Pneumoconioses. Chest 114:1740-48 1999

Sokas RK, Simmens S, Sophar K, Welch LS, and Liziewski T. Lead levels in Maryland construction workers. Am J Ind Med 31:188-194 1997

Schrader SM, Turner TW, Simon SD, Ratcliffe J, Welch LS, Simon, SD. Combining reproductive studies of men exposed to 2-ethoxyethanol to increase statistical power. Occupational Hygiene, 2:411-414 1996

Hunting KL, Longbottom H, Kalavar SS, Stern F. Schwartz E, Welch LS. Haematopoietic cancer mortality among vehicle mechanics. *Occup Environ Med* 52:673-378, 1995.

Welch LS, Hunting KL, Kellogg, J. Work-related musculoskeletal symptoms among sheet metal workers. Amer J Ind Med 27:783-791 1995.

Nessel-Stephens L, Welch LS, Weeks JS, Hunting KL, Cardenas-Amaya J. Carbon monoxide poisoning from use of gasoline powered power washers in an underground parking garage. MMWR, 44 (18):356-364, May 12, 1995

Schrader SM, Ayers-Cumbow M. Turner TW, Simon SD, Ratcliffe J, Welch LS, Grajewski B and Weyandt T. Semen quality across populations. Molecular Andrology 7(107):105-122, 1995

Sokas RK, Kolb LS, Welch LS, Chang L, Horowitz BC, E1-Bayoumi J. A Single-session Exercise to Address Medical Residents' Attitudes toward Work Disability Evaluations. Academic Medicine, 70:167 1995

Welch LS, Michaels D, and Zoloth S. Asbestos-Related Disease among Sheet Metal Workers. American Journal of Industrial Medicine 25:635-48, 1994

Hunting KH, Nessel-Stephens L, Sanford SM, Shesser R, Welch LS. Surveillance of construction worker injuries through an urban emergency department. Journal of Occupational Medicine 36:356-364, 1994

Hunting KL, Welch LS. Cuccherni BA, Seiger LS. Musculoskeletal symptoms among electricians. *Amer J Ind Med* 25:149-63, 1994

Paul M, and Welch LS: Improving education and resources for health care providers: Occupational and environmental reproductive hazards. Environmental Health Perspectives, Vol 110 Supp 2:191-198,1993

Hunting KL, Welch LS. Occupational exposure to dust and lung disease among sheet metal workers. *Brit Indust Med* 50:432-442,1993.

Welch LS, Sokas RK Development of Multiple Chemical Sensitivity of an Outbreak of Sick Building Syndrome. Toxicology and Industrial Health Vol 8(4) 47-50 1992

Cottrell A, Schwartz F, Sokas R, Kofie V, Welsh, L. Surveillance of Sentinel Occupational Mortality in The District of Columbia: 1980 1987. American Journal of Public Health. Vol 82 pp 117-119 1992

Figueroa, Gerstenhaber B, Welch LS, Klimstra D, Smith GJW, Beckett W. Fatal Hard Metal Interstitial Pulmonary Disease Associated with a Form of Welding in a Metal Parts Coating Plant. American Journal of Industrial Medicine. 21(3) 363-374 1992

Welch LS. Occupational Asthma in: *Multiple Chemical Sensitivities*. National Academy Press 1992

Hunting KL, Welsh LS. "Occupational dust exposure and lung disease among sheet metal workers," in *Proceedings of the Ninth International Symposium on Epidemiology in Occupational Health*, Cincinnati, OH, September 23-25, 1992. LJ Fine (ed). p 491-497

Sokas RK, Simmens S, Sophar K, Welch LS and Liziewski T. "'Background' lead levels in construction workers," in *Proceedings of the Ninth International Symposium on Epidemiology in Occupational Health*, Cincinnati, OH, September 23-25, 1992. LJ Fine (ed).p 359-362

Beckett W, Figueroa S, Gerstenhaber B, Welch LS, Klimstra D, Smith GJW. Pulmonary Fibrosis Associated with Occupational Exposure to Hard Metal in a Metal-Coating Plant MMWR 41(4):65-67, January 31, 1992

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Welch LS. Severity of Health Effects Associated with Building Related Illness. Environmental Health Perspectives 95 pp 67-69 1991.

Welch LS, Plotkin B and Schrader, SM. Fertility analysis of men exposed to ethylene glycol ethers; sensitivity and specificity. in press, American Journal of Industrial Medicine. 20:229-240 1991

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Teitelman A, Welsh, LS and Bracken MB. Work activity during pregnancy and risk of prematurity. American Journal of Epidemiology, 131: 104-113. 1990

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Sparer J, Welch LS, Cullen MR, and McMannus K. Effects of exposure to ethylene glycol ethers: I: exposure evaluation. American Journal of Industrial Medicine, 14:497-508,1988

Welch LS, Schrader S. Cullen MR and Sparrer J. Effects of exposure to ethylene glycol ethers: II: Male reproductive function. American Journal of Industrial Medicine, 14:509-526, 1988

Welch LS and Cullen MR. Effects of exposure to ethylene glycol ethers: III: Hematologic function. American Journal of Industrial Medicine, 14:527-536, 1988

Welch LS. Decision-making About Occupational Reproductive Hazards. Seminars in Occupational Medicine, 1: 97-106, 1986

Cullen MR, Rado T, Waldron JA, Sparer J, Welch LS. Bone Marrow Injury in Lithographers Exposed to Glycol Ethers and Organic Solvents Used in Multi-color Offset and Ultraviolet Copy Printing Processes: Archives of Environmental Health 38:347-354 1983

Chavkin W and Welch LS. *Occupational Hazards to Reproduction: An Annotated Bibliography*. Department of Social Medicine, Montefiore Hospital, NY, NY. 1980

Silvian L and Welch LS. *Your Guide to Diabetes*. Simon and Schuster, NY, NY. 1979

Cholzt I and Welch LS. *Victim's Guide: A Handbook for Rape Victims*. Mayor's Task Force on Rape, NY, NY. 1975

In Press or Preparation:

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Anderson JTL, Hunting KL, Welch LS. Injury and employment patterns among Hispanic construction workers. J Occup Environ Med 42: in press, 2000.

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Welch LS, Ringen K, Englund A. and Weeks JL. Health and Safety in Construction. in: Sullivan, and Kreiger (eds): *Medical Toxicology of Hazardous Materials* Williams and Wilkins, in press

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Book Chapters Reviews and Technical Reports

Welch, LS. Evaluating Impairment for Allergic Disorders. *The Guides Newsletter*, AMA, Chicago 1999

Ringen K, Englund A, Welch LS, Weeks JL and Seegal J. Health and Safety in Construction. Encyclopedia of Health and Safety, International Labour Organization. 1998

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Welch, LS. Environmental Agents and Endocrinology. in: *Principles and Practices of Endocrinology and Metabolism*. J.B. Lippincott Co. 1995

Ringen K, Englund A, Welch LS, Weeks JL and Seegal J (eds). Health and Safety in Construction: State of the Art Reviews in Occupational Medicine, Hanley and Belfus Philadelphia PA 10:2, 1995

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revised 7/99

Veterans And Agent Orange

Health Effects of Herbicides Used in Vietnam

Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides

Division of Health Promotion and Disease Prevention

INSTITUTE OF MEDICINE

NATIONAL ACADEMY PRESS
Washington, D.C. 1994

Foreword

In response to decades of concern surrounding the possible long-term health consequences of exposures to herbicides and the contaminant dioxin. Congress directed the Secretary of Veterans Affairs, in Public Law 102-4 signed on February 6, 1991, to request the National Academy of Sciences (NAS) to conduct a comprehensive review and evaluation of the available scientific and medical information regarding the health effects of exposure to Agent Orange and other herbicides used during the Vietnam conflict. This report from the Institute of Medicine (IOM). Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides is hereby submitted in compliance with Public Law 102-4.

Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam reviews and evaluates the available scientific evidence regarding the association between exposure to dioxin or other chemical compounds in herbicides used in Vietnam and a wide range of health effects and provides the committee's best assessment of this body of knowledge for the Secretary of Veterans Affairs to consider as the Department of Veterans Affairs exercises its responsibilities to Vietnam veterans. The report also describes areas in which the available scientific data are insufficient to determine whether an association exists and provides the committee's recommendations for areas in which future research is likely to be most productive.

That Congress would ask the NAS -- a nongovernmental organization -- to conduct this study reflects a time-honored tradition. Created by an act of Congress and signed into law in 1863 by President Abraham Lincoln, the NAS is dedicated to the furtherance of science and technology and to their

TABLE 1-1 Summary of Findings in Occupational, Environmental, and Veterans Studies Regarding the Association Between Specific Health Problems and Exposure to Herbicides

---

Sufficient Evidence of an Association

Evidence is sufficient to conclude that there is a positive association. That is, a positive association has been observed between herbicides and the outcome in studies in which chance, bias, and confounding could be ruled out with reasonable confidence. For example, if several small studies that are free from bias and confounding show an association that is consistent to magnitude and directive, there may be sufficient evidence for an association. There is sufficient evidence of an association between exposure to herbicides and the following health outcomes:

Soft tissue sarcoma
Non-Hodgkin's lymphoma
Hodgkin's disease
Chloracne
Porphyria cutanea tarda (in genetically susceptible individuals)

Limited/Suggestive Evidence of an Association

Evidence is suggestive of an association between herbicides and the outcome but is limited because chance, bias, and confounding could not be ruled out with confidence. For example, at least one high-quality study shows a positive association, but the results of other studies are inconsistent. There is limited/suggestive evidence of an association between exposure to herbicides and the following health outcomes:

Respiratory cancers (lung, larynx, trachea)
Prostate cancer
Multiple myeloma

Inadequate/Insufficient Evidence to Determine Whether an Association Exists

The available studies are of insufficient quality, consistency, or statistical power to permit a conclusion regarding the presence or absence of an association. For example, studies fail to control for confounding, have inadequate exposure assessment, or fail to address latency. There is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and the following health outcomes:

Hepatobiliary cancers
Nasal/nasopharyngeal cancer
Bone cancer
Female reproductive cancers (cervical, uterine, ovarian) and breast cancer
Renal cancer
Testicular cancer
Leukemia
Spontaneous abortion
Birth defects
Neonatal/infant death and stillbirths
Low birthweight
Childhood cancer in offspring

Veterans And Agent Orange

Update 1996

Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides

Division of Health Promotion and Disease Prevention

INSTITUTE OF MEDICINE

NATIONAL ACADEMY PRESS
Washington, D.C. 1996

TABLE 2-1 Summary of Findings from *Veterans and Agent Orange* (1994) in Occupational, Environmental, and Veterans Studies Regarding the Association Between Specific Health Problems and Exposure to Herbicides

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Testicular cancer
Leukemia
Spontaneous abortion
Birth defects
Neonatal/infant death and stillbirths
Low birthweight
Childhood cancer in offspring
Abnormal sperm parameters and infertility
Cognitive and neuropsychiatric disorders

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
FILE NO. CV98-6383 (JBW)

JOE ISAACSON and PHYLLIS LISA ISAACSON, h/w Plaintiffs,	:	
-- against --	:	**NOTICE OF APPEAL**
DOW CHEMICAL COMPANY, MONSANTO COMPANY, AMERICAN HOME PRODUCTS, INC., THOMPSON HAYWARD CHEMICAL CO., T H AGRICULTURE & NUTRITION CO., OCCIDENTAL CHEMICAL CORP., HERCULES INC., INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL, INC., C.D.U. HOLDING, INC., UNIROYAL CHEMICAL CO., HACROS CHEMICALS, INC., ULTRAMAR DIAMOND SHAMROCK CORP., MAXUS ENERGY CORP., CHEMICAL LAND HOLDINGS, INC. , THOMSPON CHEMICALS CORPORATION, and DOES 1 through 100. Defendants.	:	[Filed Mar. 10, 2000]

Notice is hereby given that Joseph and Phyllis Isaacson, plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 17th day of February, 2000.

/s/ Mark R. Cuker
MARK R. CUKER
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51 Haddonfield Road, Suite 160
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOE AND PHYLLIS ISAACSON — ORDER OF DISMISSAL

V — CV98-6383 (JBW)

DOW CHEMICAL CO., et al. — [Filed Feb. 17, 2000]

----------x

It is hereby ORDERED for the reasons stated orally on the record that the captioned case is dismissed.

It is further ORDERED that the clerk mail a copy of this order to all parties and mark the case closed.

/s/ Jack B. Weinstein
JACK B. WEINSTEIN
U.S.D.J.
2/14/2000

DATED:

SERVICE LIST

Joe and Phyllis Isaacson v. Dow Chemical Company, et al., No. CV98-6383(JBW)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL RAYMOND STEPHENSON
Plaintiff,

v.

DOW CHEMICAL COMPANY, et al.,
Defendants.

Civ. No. 99-3056 (JBW)
[Filed Mar. 27, 2000]

NOTICE OF APPEAL

Notice is hereby given that Daniel Stephenson, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 27th day of March, 2000.

Dated: New Orleans, LA

Respectfully submitted,
/s/ Stephen B. Murray, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been faxed to all counsel in these proceedings on this 6th day of April, 2000.

/s/ Stephen B. Murray, Jr.
STEPHEN B. MURRAY, JR.

SERVICE LIST

Daniel Raymond Stephenson v. Dow Chemical and Monsanto Company, USDC, EDNY Civ. No. 99-3056 (JB W)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL RAYMOND STEPHENSON
Plaintiff,

v.

DOW CHEMICAL COMPANY, et al.,
Defendants.

Civ. No. 99-3056 (JBW)
[Filed May 8, 2000]

AMENDED NOTICE OF APPEAL

Daniel Raymond Stephenson, Susan Stephenson, Daniel Anthony Stephenson and Emily Stephenson are the originally named plaintiffs in the above captioned matter. The U.S. District Court for the Eastern District of New York incorrectly lodged this matter when it was transferred to the MDL 381 action from the District Court for the Western District of Louisiana on June 1, 1999. On April 7, 2000 the Notice of Appeal was filed with the U.S. District Court for the Eastern District of New York and the caption failed to indicate more than one named plaintiff.

Therefore, Daniel Raymond Stephenson, Susan Stephenson, Daniel Anthony Stephenson and Emily Stephenson amends their Notice of Appeal previously filed by correcting the caption to include all originally named plaintiffs in their appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 27th day of March, 2000.

Dated: New Orleans, LA

Respectfully submitted,

/s/ Stephen B. Murray, Jr.
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(La. Bar No. 23877)

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been faxed to all counsel in these proceedings on this 5th day of May, 2000.

/s/ Stephen B. Muray, Jr.
STEPHEN B. MURRAY, JR.

SERVICE LIST

Daniel Raymond Stephenson v. Dow Chemical and Monsanto Company, USDC, EDNY Civ. No. 99-3056 (JBW)

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[Rivkin Radler & Kremer LLP letterhead]

April 6, 2000

Via Telecopy

Ms. June Lowe
Chambers of the Honorable Jack B. Weinstein
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *In re Agent Orange Product Liability Litigation, MDL No. 381; Isaacson v. Dow Chemical Co., et al., Civ. No. 98-6383; Stephenson v. Dow Chemical Co., et al., Civ. No. 99-3056*

Dear Ms. Lowe:

As we discussed, I enclose for Judge Weinstein's signature an order and judgment with attached transcript of proceedings in the above actions, which has been approved by all counsel as to form.

Please call me if you have any questions or if I can be of any further assistance.

Very truly yours,

/s/ Steven Brock
Steven Brock

SB/jh
enc.
cc: All Counsel w/enc.

[Enclosure]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL R. RYAN, et al. Plaintiffs, -against- DOW CHEMICAL COMPANY, et al. Defendants.	:	79 CV 747 (JBW)
In re "AGENT ORANGE" Product Liability Litigation	:	MDL NO. 381
JOE ISAACSON and PHYLLIS LISA ISAACSON, Plaintiffs, -against- DOW CHEMICAL COMPANY, et al. Defendants.	:	Civ. No. 98-6383 (JBW)
DANIEL RAYMOND STEPHENSON, et al. Plaintiffs, -against- DOW CHEMICAL COMPANY, et al. Defendants.	:	Civ. No. 99-3056 (JBW)

ORDER AND JUDGMENT

The Court heard argument on defendants' motion to dismiss in the above-captioned actions on December 13, 1999. A copy of the transcript of proceedings is attached hereto. Upon consideration of that argument and all pleadings, motions, proceedings, and the full record in MDL-381 and in the above-captioned actions, it is hereby

ORDERED that defendants' motion to dismiss is GRANTED, and

IT IS FURTHER ORDERED that the complaints and any and all amendments thereto filed in *Isaacson v. Dow Chemical Company, et al.*, Civ. No. 98-6383 (JBW) and *Stephenson v. Dow Chemical Company et al.*, Civ. No. 99-3056 (JBW), shall be dismissed as against all defendants with prejudice and without costs assessed to any party.

Dated: April ____, 2000

_____
HON. JACK B. WEINSTEIN